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EMDEN'S BUILDING CONTRACTS,
LEASES, AND STATUTES.

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BUILDING CONTRACTS, BUILDING LEASES, AND BUILDING STATUTES.

WITH

PRECEDENTS OF BUILDING LEASES AND CONTRACTS AND
OTHER FORMS CONNECTED WITH BUILDING,

AND THE

STATUTE LAW RELATING TO BUILDING,

(including the *London Building Acts*, 1891-1905),

WITH NOTES AND CASES UNDER THE VARIOUS SECTIONS,

TOGETHER WITH

AN APPENDIX OF UNREPORTED BUILDING CASES.

BY

HIS HONOUR JUDGE EMDEN.

FOURTH EDITION.

BY

JOSEPH BRIDGES MATTHEWS,

of the Middle Temple and the Oxford Circuit,

AND

W. VALENTINE BALL,

of Lincoln's Inn and the North-Eastern Circuit,

BARRISTERS-AT-LAW.

WITH

A GLOSSARY OF ARCHITECTURAL AND BUILDING TERMS

(Revised and extended by MAURICE B. ADAMS, F.R.I.P.A.).

TOGETHER WITH A

SUPPLEMENT

CONTAINING NOTES AND REFERENCES TO ALL IMPORTANT CASES UP TO
MAY, 1911, SINCE OCTOBER, 1906, INCLUDING SEVERAL UNREPORTED CASES.

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PREFACE TO THE FOURTH EDITION.

MORE than ten years have elapsed since the appearance of the 3rd edition of "Emden's Building Law," which was prepared by the learned author with the assistance of Mr. Henry Johnston.

During the past eleven years there have been numerous cases which directly or indirectly affect the interests of building owners, builders, and architects. It has been the aim of the editors of the present edition to incorporate these decisions in the text without unduly increasing the bulk of the volume; and in order to make room for new matter they have been compelled to eliminate certain subjects which were included in the older editions. Thus the law relating to employer's liability and certain statutes of minor importance, has been omitted.

In Part I. reference has frequently been made to Scotch, Irish, Colonial, and American cases. References are also given to cases which are only reported in the *Times*, the *Builder*, the *Building News*, and other journals. The chapter dealing with party walls has been considerably expanded; while in Chapter XXVII., which deals with the question of liability to pay rates, etc., an attempt has been made to enumerate all the various "outgoings" in respect of which liability has been discussed.

Part II., which contains forms and precedents, contains a number of new forms. Some of these have been obtained from the *Encyclopædia of Forms*, by the kind permission of Messrs. Butterworth, the publishers of that work.

The form of contract sanctioned by the Royal Institute of British Architects, and the forms of party wall notices, have been

inserted with the kind permission of the Royal Institute. While it would have been impossible to print all the forms appertaining to building which may from time to time be required, references are given to many building forms of special importance, which are to be found in standard works on conveyancing and elsewhere.

The notes to the London Building Act, 1894, and the other statutes in Part III. have been very largely expanded; and the text of the London Building Acts, 1898 and 1905, has been printed with full notes. It is hoped that the notes to s. 157 of the Public Health Act, 1875, will be of service to those who are connected with the making and administration of building byelaws.

With regard to the Glossary, this was omitted from the 3rd edition. The editors desire to express their thanks to Mr. Maurice B. Adams, F.R.I.B.A., for his courtesy in revising and bringing it up to date. A number of cases relating to building, which are not to be found in any of the law reports, are printed in the Appendix. These are reprinted with head notes, and with certain necessary modifications, from the *Builder*, by the kind permission of the editor of that journal; and are the result of a search through the files of that paper for the last twenty years. The editors express the hope that these cases, which are frequently referred to in the body of the work, may prove useful not only to builders and architects, but to the legal profession.

The table of cases is entirely new. In former editions it contained only the names of the parties. References to the reports are now given in the table, only one reference being printed in the text. The editors are under obligation to Mr. Charles E. M. Dillon, of the Middle Temple, for valuable assistance in the preparation of this table.

Efforts have been made, though perhaps at the risk of some prolixity and repetition, to make the index complete and exhaustive.

J. B. M.

W. V. B.

TEMPLE,
October, 1906.

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ADDENDUM.

In *Kine v. Jolly*, [1905] 1 Ch. 480 (p. 291, *post*), which was under appeal while this work was in the press, the decision of the Court of Appeal has been affirmed, the House of Lords being equally divided. See 23 T. L. R. 1.

CORRIGENDA.

P. 85, note (b), last line but one, *for* "5 P. C. 221" *read* "5 C. P. 221."

„ 88, note (e), *for* "(1905)" *read* "(1906)."

„ 90, note (w), line 2. *For* "482" *read* "624."

Emden's Building Contracts.

[*To face page 1.*]

BUILDING CONTRACTS, BUILDING LEASES, AND BUILDING STATUTES.

CHAPTER I.

PRELIMINARY.

To a person possessed of land, the value of which he is desirous of improving by building, there are, in general, four courses open. (1) He may enter into a building agreement with a contractor to erect the houses or buildings for him, and, when they are completed, grant leases at the rack rent. (2) (A) He may let the land at once to the builder on building leases, reserving a ground rent, in which case the builder may, by sub-letting, create leasehold, or, as they are misnamed "improved" ground rents; or, (B), as is more usual, he may make an agreement in the first place for building leases with the condition that the lease or leases shall be granted when the houses have been either covered in or completed, as the case may be, to his or his architect's satisfaction. (3) He may convey the land in fee to the grantee for building in consideration of a perpetual rent-charge. (4) Lastly, he may sell part of the land with restrictive covenants as to building in order to secure uniformity with the houses erected, or to be erected, on such part of the land as he retains, or in order to preserve the character of the new neighbourhood for the benefit of the several purchasers, in case he should retain none himself.

It is not intended, with respect to building leases, to enter into any preliminary dissertation upon the law of leases generally. Such a course would only swell this volume to an unnecessary size, and the law upon this subject will be found in the various books on landlord and tenant. But it is proposed to consider the law directly connected with matters relating to the improvement of land by building. We shall, therefore, divide the subject as follows :—

PART I.

THE LAW RELATING TO BUILDING LEASES, BUILDING CONTRACTS, THE CONSTRUCTION OF, AND THE IMPROVEMENT OF LAND BY, BUILDINGS, THE LAW RELATING TO EASEMENTS, ETC.

PART II.

PRECEDENTS FOR BUILDING PURPOSES.

PART III.

THE STATUTE LAW WITH RESPECT TO BUILDING, WITH THE CASES DECIDED IN REFERENCE TO THE SAME.

CHAPTER II.

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THE subject-matter of this chapter may be dealt with in two sections, viz., Sect. I., What persons, etc., may make building leases and agreements; Sect. II., What lands may form the subject-matter of building leases and agreements.

SECT. I.—PERSONS, ETC., WHO MAY ENTER INTO BUILDING LEASES AND AGREEMENTS.

(1) GENERAL RULE.

All persons who are not under any legal disability may make building contracts, and may grant building leases for such terms, and subject to such conditions and restrictions, as are not inconsistent with the nature and quantity of the estates which they have. (a) It is now intended to refer shortly to certain statutory provisions and rules of law relating to exceptions to the above general rule.

(a) Woodfall, *Law of Landlord and Tenant* (17th ed.), p. 1. As to corporations, see p. 43.

(2) MORTGAGORS AND MORTGAGEES.

The difficulties in the way of building leases by a mortgagor or mortgagee in possession have been, to a great extent, removed by the Conveyancing and Law of Property Act, 1881, sect. 18, (*b*) to which reference should be made. (*c*) This section only applies in the absence of a contrary intention in the mortgage deed, (*d*) and it must be borne in mind that it is a very common practice to exclude, or at least restrict, its operation, and in that case the concurrence of both mortgagor and mortgagee must be obtained.

(3) TENANTS FOR LIFE.

Building land is now largely developed by means of the provisions of the Settled Land Acts, 1882 to 1890. (*e*) Wide powers are given to a tenant for life, a term which includes almost all limited owners with the exception of a dowress (who, however, is within the Settled Estates Act, 1877), and the management of settled lands is thereby practically taken out of the hands of trustees and placed in those of a tenant for life.

(4) TENANTS IN TAIL.

Tenants in tail are tenants for life within the meaning of the Settled Land Acts, 1882 to 1890. The Fines and Recoveries Abolition Act, 1833, (*f*) should be referred to in relation to the powers of tenants in tail.

(5) THE CROWN.

By the 1 Anne, c. 7, sect. 5 (Ruff.), the Crown may grant building leases for any term not exceeding fifty years or three lives. In modern times most of the Crown lands have been placed under the management of the Commissioners of Woods, Forests, and Land Revenues, who may grant building leases for any term not exceeding ninety-nine years, subject, however, to certain restrictions and conditions. (*g*)

(*b*) 44 & 45 Vict. c. 41, sect. 18.

(*c*) *Wolstenholme's Conveyancing and Settled Land Acts*, 9th ed. (1905); *Hood and Challis on the Conveyancing and Settled Land Acts*, 6th ed.

(*d*) *Renner v. Tolley*, 68 L. T. 815.

(*e*) Settled Land Act, 1882, 45 & 46 Vict. c. 38; S. L. A. 1884, 47 & 48 Vict. c. 18; S. L. A. 1887, 50 & 51 Vict. c. 30; S. L. A. 1889, 52 & 53 Vict. c. 36; S. L. A. 1890, 53 & 54 Vict. c. 69. See the works referred to in note (*c*) *supra*, and see also *Carson's Real Property Statutes* (1902 ed.).

(*f*) 3 & 4 Will. IV. c. 74.

(*g*) See the Crown Lands Acts, 1829 to 1885, a list of which will be found in the second schedule to the Short Titles Act, 1892.

(6) COMPANIES AND CORPORATIONS, ETC.

Reference must be made to the statutory provisions applicable, according to the nature of the company, corporation, or body; such provisions do not fall within the scope of this work.

(7) INFANTS.

See 5 & 6 Will. IV. c. 17; 11 Geo. IV. and 1 Will. IV. c. 65. And see also the Settled Estates Act, 1877; the Conveyancing and Law of Property Act, 1881; and the Settled Land Act, 1882.

(8) LUNATICS.

The law relating to lunatics will now be found in the Lunacy Act, 1890, (h) the Settled Estates Act, 1877, and the Settled Land Acts, 1882 to 1890.

(9) MARRIED WOMEN.

The general result of the Married Women's Property Act, 1882, (i) is that—

(1) Every woman married after 1882, and

(2) Every woman married before 1883, as regards property acquired after 1882,

can make building leases or agreements as if she were a *feme sole*. In all other cases married women are still governed by the old law, for which reference must be made to a work on real property, or on the law relating to husband and wife. (k)

(10) BANKRUPTS.

As to the powers of a bankrupt, see the Bankruptcy Acts, 1883 and 1890.

(11) EXPRESS POWERS.

Building leases are often granted under express powers conferred in terms by settlements and wills. The law relating to powers does not fall within the scope of this work. (l)

(h) 53 Vict. c. 5. See the Irish case of *Tracy v. McCabe* (1893), 32 L. R. (Ir.) 21 (noted *post*, p. 29), as to the liability of the committee of a contractor who has become lunatic, to reimburse the surety.

(i) 45 & 46 Vict. c. 75.

(k) See, e.g., *Lush on Husband and Wife* (1896), 2nd ed. But the powers conferred by the Act do not apply to property of which married women are trustees for other people: *re Harkness and Allsopp* (1896), 2 Ch. 358; *re Brooke and Fremlin* (1898), 1 Ch. 647.

(l) As to powers, see *Farwell on Powers*, 2nd ed.

SECT. II.—LANDS FORMING THE SUBJECT-MATTER OF BUILDING LEASES AND AGREEMENTS.

(1) SETTLED ESTATES AND LAND.

The Court was empowered to authorise building leases, contracts, and grants of settled estates by the Settled Estates Act, 1877. (*m*) This Act is still in force, but in practice it has been superseded by the Settled Land Acts, 1882 to 1890.

(2) CHARITY LANDS.

Reference must be made to the Charitable Trusts Acts, 1853 to 1894, for powers to grant leases of charity lands. Leases to trustees for charitable purposes must conform to the provisions of the Mortmain and Charitable Uses Act, 1888. (*n*)

(3) COPYHOLDS.

It is a cause of forfeiture of copyholds if the tenant makes a lease for more than one year, except under a special custom, or with licence from the lord. Except in manors where the fines and fees are merely nominal, and the tenure is considered in the neighbourhood as good as freehold, it is usual for copyholders to obtain the enfranchisement of the land before disposing of it in any way for building purposes. (*o*)

(4) DISUSED BURIAL GROUNDS.

By sect. 3 of the Disused Burial Grounds Act, 1884, (*p*) it is enacted that, after the date thereof, it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship.

The expression "disused burial ground" means any ground, whether consecrated or not, which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council. This definition includes land which has been set apart

(*m*) 40 & 41 Vict. c. 18.

(*n*) 51 & 52 Vict. c. 42.

(*o*) See Davidson, vol. ii. part i. (4th ed.), 526, where will be found a precedent of a surrender of copyhold land for building purposes, and also a deed of covenant to accompany the same.

(*p*) 47 & 48 Vict. c. 72. See *Trustees of St. Saviour's Rectory and Oysterre*, L. R. 31 C. D. 412; *Gibbons v. Chambers*, 1 C. & E. 577.

What is a
"disused
burial
ground."

for the purposes of interment, even though it was so set apart in contravention of the Order in Council, and consequently could never have been lawfully used for the purposes of interment, and s. 3 of the Disused Burial Grounds Act, 1884, prohibits the use of any part of the land so set apart for building purposes. (q)

The expression "building" includes any temporary or movable building. (r) Meaning of the term "building."

A handstand is a building within the meaning of this section, (s) but a churchyard wall, so built as to form an arcade to protect frescoes on the wall from the weather, was held not to be a building. (t)

A borough council has power to erect a hoarding on a disused burial ground for the purpose of preventing the owner of an adjoining house acquiring a right to the access of light. (u)

The site of a church where intramural burial has taken place has not been "set apart for purposes of interment," and is not within the prohibition against building. (v) "Set apart for purposes of interment."

In order to decide whether ground has been "set apart for the purposes of burial," the cemetery or burial ground ought to be looked at as a whole, and the whole land of which such cemetery is formed is to be deemed as "set apart" for such purposes, although portions of it may never have been used for interments. (x)

For a building to be an "enlargement of a church," it must have physical connection with the church, and must serve some purpose ancillary to the conduct of the services. A vestry or a heating chamber fulfils this requirement, but a parochial hall does not. (y) "Enlargement of a church."

A disused burial ground may not be used for a school and playground. (z)

Apart from the Disused Burial Grounds Act, 1884, an agreement to build on a disused unconsecrated burial ground, necessitating the removal of some thousands of corpses—which removal would, of necessity, involve an outrage on public decency, amounting to an indictable offence—is illegal. (a)

(q) *Bosworth and the Corporation of Gravesend, In re* (1905), 2 K. B. 426.

(r) 50 & 51 Vict. c. 32, s. 4.

(s) *A. G. v. St. Pancras Vestry* (1894), 69 L. T. 627.

(t) *St. Botolph, etc. v. Parishioners* (1900), p. 69.

(u) *Paddington (Mayor of) v. Att.-Gen.* (1905), 22 T. L. R. 55.

(v) *Re Ecclesiastical Commissioners and New City of London Brewery Company*, [1895] 1 Ch. 702.

(x) *Re Ponsford and Newport District School Board* (1891), 1 Ch. 455.

(y) *L. C. C. v. Dundas*, 19 T. L. R. 670, at p. 671.

(z) *St. Sepulchre, Holborn Viaduct*, 19 T. L. R. 723.

(a) *Gibbons v. Chambers*, 1 C. & E. 577; *St. Pancras v. St. Martin's in-the-Fields*, 6 Jur. N. S. 540.

CHAPTER III.

BILLS OF QUANTITIES, SCHEDULE OF PRICES AND SPECIFICATIONS.

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Preliminary.—Before discussing building contracts, it is necessary to consider certain preliminary matters with which the builder must deal before the contract is entered into. These are (1) Bills of Quantities; (2) the Schedule of Prices; and (3) Specifications.

SECT. I.—BILLS OF QUANTITIES.

(1) TAKING OUT THE QUANTITIES.

A bill of quantities for work to be done in erecting a building professes to be a correct list of the quantities of work and materials required to be done and provided in the erection thereof. (*a*)

“Taking out the quantities,” or a “bill of quantities,” is the usual mode of obtaining tenders; (*b*) a schedule of the items of materials and workmanship is made, and copies are supplied to the various competitors for pricing. A single “quantity surveyor” is in general employed; but two surveyors are frequently appointed when the works are extensive, one by the employer, and the other by the builders who intend to furnish tenders.

(2) BILLS OF QUANTITIES AS PART OF THE CONTRACT.

Bills of quantities are sometimes made part of the contract, and, indeed, this is very often the case in small contracts, particularly in the provinces; in which case the architect takes out

(*a*) See *Scrivener v. Pask*, L. R. 1 C. P. at p. 716.

(*b*) The Council of the Royal Institute resolved in 1874 that the whole question of the employment of quantity surveyors demands much further con-

his own quantities, and the contract usually consists of the agreement, the drawings, and bill of quantities. But it is not safe to make a contract in this way. The danger of making the bill of quantities part of the contract is illustrated by the case of *Kemp v. Rose*. (c) The effect of so doing may be, unless controlled by other terms, to make the contract an agreement to do so many yards and no more. That course is obviously unsafe, and consequently not usual, because it can hardly ever be accurately known beforehand what is the exact number of yards that may be necessary, and in that case, if the work actually executed exceed the specified number of yards, the excess will be extra work. (d)

Inasmuch as the bill of quantities must often be referred to in the "conditions" of a building contract, it is well to insert a condition providing that "any reference in the said conditions to the bills of quantities shall not have the effect of constituting them part of the contract." (e) The danger of omitting this precaution is well illustrated by the case of *Putman and Potheringham v. Pidditch*. (f) There a building contract provided that "the contractors will substantially complete, etc., for the sum of £17,000, the several works required to be done in the erection of a block of flats on the site, in a good sound, lasting, and workmanlike manner, according to the *plans, invitation to tender, specifications, and bills of quantities, signed by the contractors*." The plans and specifications were signed by the contractors, so was the priced bill of quantities which he gave in. The building-owner, who was himself an architect, had the bills of quantities prepared by his own clerk. The contractors having found discrepancies in the quantities, sued the building-owner for the deficiency, alleging that the bill of quantities formed part of the contract, and that they were entitled to be paid for the work shown on the plans and specifications although not fully taken out in the quantities. It was held by Channell, J., (a) that the words set out above in italics were intended (i) to define the work which was to be done, and turn the indefinite "a" block of flats into "the" block of flats;

Necessity for clause excluding the bill of quantities.

consideration. See Schedule of B. I. B. A., *post*. See a case in *Times* of February 8, 1875, where a quantity surveyor claimed 2½ per cent. on the lowest tender, but the custom was pronounced unreasonable, and evidence was given that 1½ per cent. was the real custom, and that was all the plaintiff recovered. And see also *North v. Bassett*, [1892] 1 Q. B. 333.

(c) 1 Gilf. 258; and see the case, *post*, p. 87.

(d) *Ib.*, per Stuart, V.C., at p. 268.

(e) A clause of this kind proved effective in the case of *Kirk and Randall v. Wyndham, Builder*, July 2, 1904.

(f) Appendix, p. 674.

and (ii) to set forth the instructions as to the mode in which the work was to be done; (b) that if the bill of quantities was merely introduced for the purpose of showing the way in which the extras were to be priced that had already been done by another clause in the contract; (c) that upon the true construction of the contract the bills of quantities and plans could be put together and looked at for the purpose of ascertaining the amount of work; and (d) that the quantities provided the amount of work, and that if in the course of the work the contractors were directed to exceed that amount, they were entitled to charge extra.

(3) ARCHITECT AS QUANTITY SURVEYOR.

Although the architect sometimes acts as quantity surveyor, it is not usually advisable to allow him to fulfil this duty. If paid by the builder, he is not, when differences or misunderstandings arise, in that impartial position which it is necessary he should hold between employer and builder; and, again, the fact of the architect acting both professionally for the building-owner and also as quantity surveyor for the builder, may be the cause of similar difficulties to those which occurred in the case of *Scrivener v. Pask*. (g) The Royal Institute of British Architects recommend (h) that when an architect supplies builders with quantities, he should do so with the concurrence of his employer, and that the architect should be paid by him rather than by the builder.

(4) EMPLOYMENT OF QUANTITY SURVEYOR.

Implied
authority of
architect to
employ
quantity
surveyor.

If the building agreement does not provide (i) in what manner, and by whom, the expenses incurred in taking out the quantities are to be paid, it may be shown, in accordance with the rule that extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent, (k) that the architect, who is retained to prepare the plans and specifications, has an implied authority to engage a surveyor to take out the quantities, as agent for the employer. The usage is a notorious one and valid, (l) that the fees of the

(g) 18 C. B. N. S. 785, and *post*, p. 13.

(h) See the Schedule, R. I. B. A., No. 18, *post*, p. 472.

(i) For a precedent of a clause to this effect, see *post*, p. 385.

(k) Parke, B., in *Hutton v. Warren*, 1 M. & W. 474; and notes to *Wigglesworth v. Dallison*, Doug. 201.

(l) *North v. Bassett*, [1892] 1 Q. B. 33. See *Moon v. Guardians of Witney Union*, 3 Bing. N. C. 814; *Gwyther v. Gaze*, *Times* (1875), February 8, p. 11; *Birdseye v. Dover Harbour Bd.*, *Times*, April 14, 1881; where the building-owner was held liable. See *Taylor v. Hall*, 4 Ir. R. C. L. 467, where the custom

quantity surveyor are paid by the builder whose tender has been accepted by the building-owner; while, if no tender be accepted, or the work be abandoned, or an entirely independent plan adopted, the building-owner or architect (*n*) is liable.

As to the liability of the builder, it has been decided (*n*) Liability to pay for taking out quantities. that although there is no such privity between the builder and the quantity surveyor as to enable the builder to sue the quantity surveyor for negligence or breach of duty, (*o*) the quantity surveyor can recover his fees from the builder whose tender has been accepted. The effect of the employment of the quantity surveyor is, not that there is a contract by the building-owner to pay the quantity surveyor in any event, but that the latter is to be paid by the builder, if his tender is accepted. (*oo*)

A builder cannot divest himself of his liability to pay the quantity surveyor his charges out of the first instalment, by taking an assignment of the property from the building-owner. (*p*) Rights of quantity surveyor not affected by subsequent variation of relations between builder and building-owner.

"If the builder chooses to vary his relations with the building-owner, he may do so, but not so as to prejudicially affect the claim of a third party who has nothing to do with the arrangement." (*q*)

In *Plimsoul v. Lord Kilmorey*, (*r*) the plaintiff, a quantity surveyor, contended that by a general usage or practice of the building trade, an architect is authorised to employ a quantity surveyor to measure up the work which has been executed, for the purpose of a final certificate; that his commission is charged in the builder's account, and on payment to the builder the amount is handed by the latter to the surveyor. In giving judgment the Court said, that with respect to the general usage, of which evidence had been offered, he thought a jury would hesitate to establish it. There were good grounds for considering it unreasonable as applied to circumstances such as were presented in this case, and it must often prejudice a building-owner. Employment of surveyor to measure up for the purpose of certificate.

of the building trade as to taking out quantities was considered; and *Young v. Smith* (unrep., but referred to in *North v. Bassett*, *supra*).

(*m*) As to architect's liability, see p. 12, *post*.

(*n*) *North v. Bassett*, *supra*.

(*o*) *Priestley v. Stone*, 4 T. L. R. 730, approved by A. L. Smith, J., in *North v. Bassett*, *supra*, L. R., p. 336.

(*oo*) *Per Mathew, J.*, in *North v. Bassett* (1892), 1 Q. B. at p. 335.

(*p*) *Mellor v. Britton* (1900), 16 T. L. R. 465.

(*q*) *Ib.*, per Bigham, J. As to rights of quantity surveyor where builder fails to complete, see *post*, p. 12.

(*r*) 1 T. L. R. 48. See also *Birdseye v. Dover Harbour Commissioners*, *Times*, April 14, 1881; *Peattie v. Gilroy*, 10 Cl. of Sess. Cas. 4th ser. 226.

Remedy of
quantity
surveyor
against
architect.

But where a building-owner or an employer employs an architect only to prepare plans, and not to prepare the specification and bill of quantities, and the architect, without authority in that behalf, employs a quantity surveyor, who gets out the quantities, and the matter is not further proceeded with, the remedy of the quantity surveyor is not against the owner or employer, but against the architect personally, for breach of warranty of authority. (*s*)

Remedy of
surveyor
where per-
formance of
contract
prevented by
builder.

Where, however, the performance of an accepted contract is prevented by the act of the builder employed to carry out the work, he will, according to the above custom, (*t*) if proved, be liable to the surveyor for his fees in taking out the quantities.

So, where a builder contracted with a surveyor, that if he would supply the quantities for a certain projected building, he, the builder, would, if he were accepted as the contractor, pay the surveyor for the same out of the first instalment; and the quantities were furnished, but the builder subsequently abandoned the building contract: it was held, (1) that it was implied that the builder should duly proceed with the building contract; (2) that, performance of his contract with the surveyor having been rendered impossible by his own act, he was bound to pay the surveyor for the quantities furnished; and, further, that it was not a condition precedent that the first instalment should be previously paid. (*u*)

Custom not
sufficient to
establish
employment.

It is not sufficient, however, for the surveyor to prove a custom in order to make the employer liable. So where an architect was employed to make plans for a theatre, the employer objected to the cost of the theatre as planned. The architect then employed a quantity surveyor to reduce the quantities; but the employer ultimately decided not to build. It was held that the quantity surveyor could recover his charges against the employer only upon evidence of actual instructions, and not by virtue of any custom. (*v*)

(5) REMUNERATION OF QUANTITY SURVEYOR.

Where it was found by a jury as a fact that the architect had power to employ a quantity surveyor, the judge to whom the decision of the *quantum* of remuneration was left, held that

(*s*) *Antisell v. Doyle* (1899), 2 Ir. R. 275. See also *Gordon v. Blackburne, Builder*, February 1, 1879, where an architect was held liable in similar circumstances.

(*t*) p. 10, *supra*.

(*u*) *McConnell v. Kilgallen*, L. R. Ir. 2 C. L. 119. See also *Gritton v. Moore, Builder*, July 10, 1869.

(*v*) *Evans v. Carte, Times*, May 5, 1881, p. 4.

2½ per cent. on the lowest tender, which was set up as customary, was unreasonable. He assessed the damages at 1½ per cent. (w)

Where the defendants employed an engineer to act for them in certain proceedings, and the engineer employed the plaintiff, a surveyor, to make certain surveys and reports, and nothing was said about remuneration: it was held that there was a custom by which the plaintiff, who sued for fees, was entitled to payment in accordance with Ryde's scale, and Day, J., gave judgment accordingly. (x)

The case just referred to is not consistent with the decision of Farwell, J., in the recent case of *Stenning v. Mitchell & Co.* (y) There an architect and surveyor sued for fees estimated upon the basis of Ryde's scale. It was held that although in the circumstances of the case the scale was applicable, it was not always applicable, and that it was the duty of the Court to consider the work done in each particular case.

(6) ACCURACY OF BILLS OF QUANTITIES.

It is a rule that the mistake of a party in some fact or circumstance collateral to an agreement, though it may have induced him to make the agreement, yet if it do not enter into the agreement as matter of stipulation or warranty, and if the other party be not implicated in any way in the mistake, is wholly immaterial to the validity of the agreement at law, and cannot be alleged in avoidance of the agreement; and where a builder entered into a contract for work according to a plan and specification, upon an erroneous statement of the quantities, which had been taken out by the architect: it was held that he had no claim for more than the contract price, in respect of extra quantities of materials used beyond what he had supposed would be necessary; inasmuch as the architect had not acted as agent of the employer in taking out the quantities, nor was the latter responsible for the mistake. (z)

(w) *Guyther v. Gaze*, *Times*, February 8, 1875. See also *Gordon v. Blackburne* (1879), *Builder*, February 1, where the architect was held liable to the quantity surveyor.

(x) *Buckland v. Pawson* (1890), 6 T. L. R. 421.

(y) Appendix. p. 661. See also as to Ryde's scale, *Drew v. Joselyne*, 4 T. L. R. 717; *Debenham v. King's College, Cambridge*, 1 T. L. R. 170.

(z) *Scrivener v. Pusk*, 18 C. B. (N. S.) 785. See *Sharpe v. San Paulo Ry. Co.*, 1 L. R. 8 Ch. Ap. 597; and *Thorn v. Mayor of London*, L. R. 9 Ex. 163, *post*, p. 17, as to incorrectness of specifications; but see *Kimberley v. Dick*, L. R. 13 Eq. 1, as to the agency of the architect in superintending the works under a contract, *post*, pp. 87, 89.

The mere employment, therefore, of an architect to prepare plans, etc., for a house, and to procure a builder, does not render the employer responsible as guaranteeing the accuracy of the bill of quantities furnished by such architect to the builder. (a)

Effect of
inaccuracy.

In another case, (b) a builder contracted to build a church for £1998, whereas it really cost him, with extras, £3600. The mistake arose owing to inaccuracies in the bills of quantities. In an action to recover the cost of the extras, the plaintiff was non-suited.

In *re Bemrose, Ford v. Bemrose*, (c) an unsuccessful attempt was made to set up a custom or usage to the effect that, when tenders are invited for the erection of works in accordance with plans, and a bill of quantities is furnished, a person making a tender is not expected to verify the quantities himself, but is expected and intended to assume the correctness of the quantities and to tender upon that assumption, and that if such quantities in the event prove to be greater or less than the actual quantities, the price is to be reduced or increased by an amount ascertained and determined by the scale of prices given in the tender as the scale by which payments for extras are to be determined. An arbitrator found that such a custom or usage existed; but the Court of Appeal held that it contradicted the contract and could not be maintained. The contract was for the execution of the works in accordance with the plans and specification for the price of £10,559.

The law was thus stated by Collins, M.R.: "It is a well-ascertained practice that the building-owner places before the builder documents specifying the materials on which he is to make his tender. But I think it equally well understood that a bill of quantities, whether it forms part of the specification or is a separate document, is not intended to be a representation in the sense of being a warranty. It is an estimate which the builder may act on as an honest estimate made by a qualified person, but it is not a warranty. It cannot be pushed beyond an estimate and turned into a contract." (d)

It follows that the builder will, in general, in the absence of

(a) See *Stevenson v. Watson*, L. R. 4 C. P. D. 148. See also *Nuttall v. Lynton & Barnstaple Ry. Co.*, 82 L. T. 17, for an example of a case where it was a question whether, on the construction of the contract, the contractor was entitled to claim for extra work.

(b) *Sherren v. Harrison* (1860), *Times*, February 8.

(c) (1902) 18 T. L. R. 443.

(d) *Ib.*, at p. 444.

fraud, be bound by the quantities unless he can show that the employer guaranteed their accuracy; (e) and even where the builder might not be bound by the quantities, he must, if he wishes to dispute them, stop at once on discovering their inaccuracy. (f)

It is the custom to refer in the building contract to the plans and specifications only, the builder being supplied by the architect with bills of quantities from which to make his tender. From the above cases it will be seen that the builder, under such circumstances, in the absence of fraud, takes the whole risk of the bills of quantities being inaccurate, or being prepared by incompetent persons. It is generally fairer to the builder, architect, and employer to insert a clause providing that errors in the bill of quantities shall be made good within a prescribed time, and such a clause is now frequently inserted in the building contract. (g)

Protection
to builder
against
inaccuracy.

If the architect is employed by the builder for reward to take out the quantities, he may be liable if the bill is not reasonably accurate. (h)

Liability of
architect for
inaccuracy
in bills of
quantities.

(7) AGREEMENT RELATING TO BILLS OF QUANTITIES.

It would seem that, in general, complications might be avoided by an agreement in the first instance by the building-owner with the surveyor to pay his fees for taking out the quantities, with suitable provisions protecting the former against any inaccuracies in the quantities, and stipulating that the surveyor should look to the builder for payment in case the latter refuse to proceed after his tender has been accepted. For it will be seen from the above cases that, whoever employs, or is directly answerable to, the surveyor for the bill of quantities, whether the building-owner or the builder, when the contract is performed, the money for the same comes out of the pocket of the building-owner and goes through the hands of the builder, and he includes it in the contract price; and that where, on the other hand, the performance is prevented by the act of the building-owner, he is liable for the surveyor's fees.

Building-
owner ul-
timately liable.

e) *Kemp v. Rose*, 1 Giff. 258; *Scrivenor v. Pask*, 18 Q. B. N. S. 785, *supra*. As to the rectification of a schedule of quantities annexed to a contract for the execution of works, see *Neill v. Midland Ry. Co.*, 17 W. R. 871.

f) *Kimberley v. Dick*, L. R. 13 Eq. 20.

g) See a clause, F. XIa., *post*, p. 392 n.

h) *Bolt v. Thomas*, noted *post*, p. 80.

Where by the terms of contracts entered into with a local authority for the purposes of the Public Health Act, 1875, the surveyor of the authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, certain percentages, he was liable to a penalty under sect. 193 of the Act as having been "concerned or interested" in a contract made with the local authority, of which he was an officer or servant. (*i*)

SECT. II.—SCHEDULE OF PRICES.

(1) DEFINITION.

A schedule of prices is a statement of the values of the materials and labour; it is occasionally made a schedule to the building contract, where a bill of quantities does not form part of the contract.

(2) DISADVANTAGE OF INCORPORATING THE SCHEDULE.

But a contract solely on this footing is not advisable, as it gives the employer no idea of the total expense. Such a contract may be an "entire" contract just as much as one in which a lump sum is ascertained. So where contractors offered "to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work for the sums above named respectively, and to keep the whole in order under fair wear and tear for two years from the date of completion. All brickwork, carpenters' and masons' work, and materials are to be provided for us, but the drawings and general instructions required for them to work to will be provided by us subject to the architects' approval." This offer was signed by the contractors. There were ten different parts in the specification, to each of which a price was affixed. It was held that no payment was due until the whole work was completed. (*k*)

SECT. III.—SPECIFICATIONS.

(1) DEFINITION.

The specification (*l*) is the written description of the nature of the work and to which the contract relates.

(*i*) *Whiteley v. Barley*, 21 Q. B. D. 154.

(*k*) *Appleby v. Myers*, L. R. 2 C. P. 651. See also *Whitaker v. Dunn*, 3 T. L. R. 602, where a contract to lay down a pavement at so much a year, on completion, was held to be an entire contract.

(*l*) See *Allen v. Foxall*, 1 C. & K. 315, as to evidence of tender and

Although details, which were known to be clearly necessary to carry out the work, are not expressly mentioned in the specification, yet the builder will not be allowed to charge for such evident omissions as extras. For instance, where the specification omitted to refer to flooring, it was held that flooring could not be charged for as an extra. (*m*)

Details
omitted from
specification.

(2) ACCURACY NOT WARRANTED.

Where plans and a specification are prepared for the use of those who are asked to tender, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification. (*n*) As a general rule, this is made quite clear by a clause in the building agreement. A form of such a clause will be found at p. 376, *post*. The builder, therefore, should examine them for himself; for, if he undertake the contract on the basis of specifications which understate the amount of the work to be done, (*o*) or specify an impossible mode of doing it, he will be bound by the contract. (*p*)

It seems that if the builder has any remedy under the above circumstances, it would not be in an action for damages as for breach of warranty, but to be paid from time to time for the work he has completed. (*q*)

(3) DEVIATIONS.

If a builder undertake to do work of specified dimensions and with specified materials, and deviate from the specification without special orders authorising such deviation, he cannot recover for the work, labour, and materials as upon a *quantum valebat*. (*r*)

specification forming contract. In a Canadian case (*Ryan v. Carleton* (1900), 31 Ont. L. R. 639), it was held that plans and specifications drawn for the erection of buildings, the specifications being divided under the headings "Notes," "Conditions," and "Specifications," referred to in the contract, and initialled by the parties, all bound up together, and forming one document, must be read together as constituting one entire contract.

(*m*) *Williams v. Fitzmaurice*, 3 H. & N. 844.

(*n*) *Thorn v. Mayor of London*, L. R. 9 Ex. 163; *Ib.*, 10 Ex. 112; *Ib.*, 1 App. Cas. 120; *Sharpe v. San Paulo Ry.*, L. R. 8 Ch. Ap. 597. See *Scrivener v. Pask*, 18 C. B. N. S. 785; and *ante*, p. 13, as to accuracy of quantities.

(*o*) *Sharpe v. San Paulo Ry.*, *supra*.

(*p*) *Thorn v. Mayor of London*, *supra*.

(*q*) *Thorn v. Mayor*, per Kelly, C.B., at p. 174 in the L. R.

(*r*) *Ellis v. Hamlen*, 3 Taunt. 52. See *post*, Chap. IX., p. 126, as to deviations and right to payment, and *post*, Chap. XIV., p. 182, as to "extras."

And, in such a case, it will be seen that the possession of the land alone cannot raise any inference of acceptance in a sense implying a consent to pay for the deviations; but there must be some positive request or acquiescence in order to create a contract. (*s*)

Terms used
in specifica-
tions.

In an American case the specifications in a contract for masons' work and grading, contained the requirement:—"Fill the walls solidly as laid with mortar, carefully pointed inside and outside above ground. Below ground the outside of walls to be as smooth as possible, and plastered from footings to grade with half cement mortar; this is to be allowed to dry, and the wall approved before the filling is commenced." It was held that the words "above ground" qualified only the words "carefully pointed inside and outside," and that the contract was to build solid walls with mortar below as well as above ground. (*t*)

Evidence as
to work
included in
estimate.

Allowance
for old
materials.

Where a builder agrees to do certain work in accordance with plans and a specification, and by the specification the builder is to allow for the value of the old materials, although, in an action by the builder against the owner, the former alleges that he had made this allowance in his estimate, no evidence will be received that the work was not done according to the plans and specification, and unless the builder can prove that he had informed the owner or the architect of his having allowed for the old materials in his estimate, he must deduct the value from the amount of his charge. (*u*)

(4) PREPARATORY WORK.

In an entire building contract, preparatory work such as clearing away old buildings on the site appears to be impliedly included. There is no English decision to this effect, but the principle has been applied in New York. (*v*)

(*s*) See *post*, Chap. IX., under builder's right to payment, p. 120, *et seq.*

(*t*) *Carberry v. Farnsworth* (1900), 177 Mass. 398.

(*u*) *Harvey v. Lawrence*, 15 L. T. N. S. 571.

(*v*) *Shute v. Hamilton* (1871), 3 Daly (N.Y.) 462.

CHAPTER IV.

TENDERS AND SURETIES.

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SECT. I.—TENDERS.

(1) GENERALLY.

A LARGE number of building contracts form the subject of public tender. Care should always be taken not to accept a tender absolutely, but only conditionally on the builder signing a contract in a prescribed form, and also, in some cases, finding sureties, (b) to be approved by the employer, for the due execution of the work.

A tender made by a contractor, and an acceptance by the employer, constitute in law a binding contract when the acceptance is unqualified, and no new terms are contemplated. (c) An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if, at the time when the documents were signed, the parties had a contracting mind, and it was their intention thereby to enter into an agreement, and the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language. (d)

Tender and acceptance may constitute a contract.

b) See *post*, p. 25.

(c) See *post*, p. 22.

(d) *Lewis v. Brass*, L. R. 3 Q. B. D. 667; and see *Crossley v. Maycock*, L. R.

(2) FORM OF TENDER.

An offer is none the less binding because it is in the form of an estimate and headed with the word "estimate." So where builders wrote, in answer to a letter inviting a tender, "Estimate. Our estimate to carry out the sundry alterations to the above premises according to drawings and specifications amounts to the sum of £1230," and this tender was accepted, they were held liable in damages for refusing to carry out the work, the Court holding that this was a firm offer, and stating at the same time that if there was a custom or understanding to the effect that such an estimate was not an offer, that custom was contrary to law. (c)

Suitable forms of tender will be found at pp. 372, 427, *post*.

(3) PREPARATION OF A TENDER.

The preparation of the figures upon which to base a tender by the builder is a matter to which considerable attention should be directed, inasmuch as a mistake cannot afterwards be rectified, the contract being complete (subject, in certain cases, to the execution of an agreement) by tender and acceptance. In a recent Scotch case (f) the defender offered to execute work for the pursuers for the lump sum of £859. His offer was accepted. He afterwards found that, owing to an error in calculation made by his son, the offer was £826 less than it should have been. In an action for damages for breach of contract, the defender having contended that this mistake released him from his contract, the Court held that he was not released—the mistake having arisen through no fault of the pursuers—and that the pursuers were entitled to damages. (g)

In another case, (h) a tender for the supply of granite to the plaintiffs contained the words, "*weather and other circumstances permitting.*" These words were struck out by the plaintiffs' clerk, and the defendant was informed of the fact. No reply having been received from him for several days, the contract was sealed. Delays having occurred owing to bad weather, the plaintiffs sued

18 Eq. 180; *Jones v. Victoria Dock*, 46 L. J. Q. B. 219; *Bolton v. Lambert*, 41 C. D. 295. See the Precedents, F. XXVI., *post*, p. 426, for a form of tender for building leases.

(e) *Croshaw v. Pritchard* (1899), 16 T. L. R. 45.

(f) *Seaton Brick Co. v. Mitchell* (1900), 11 F. (5th ser.) 550.

(g) See also *Ewing v. Lawson* (1900), 16 T. L. R. 140, following *Smith v. Hughes*, L. R. 6 Q. B. 597.

(h) *Dartford Guardians v. Trickett*, 59 L. T. 754.

for breach of contract. It was held that they were entitled to recover.

(4) ACCEPTANCE OF A TENDER.

In *Lewis v. Brass* (i) the acceptance of a tender did not contain any terms such as "subject to signing a contract," and it was not intended that the agreement should be conditional upon signing a contract; if it had contained such terms, the tender would only have been a proposal for a contract, and there would be *locus penitentiae* until a written contract should be signed. (k) And, in *Winn v. Bull*, (l) where, by a written agreement, the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract," and no other agreement was ever entered into between the parties; it was held by Jessel, M.R., that there was no final agreement of which specific performance could be enforced against the defendant, and he explained the rule as follows: "It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to, and is dependent upon, a formal contract being prepared. When it is not expressly stated to be *subject* to a formal contract, it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail." (m)

In a later case, (n) where one of the conditions was that the person tendering should undertake to execute a contract for the due performance of the works and enter into a bond with two responsible sureties for their due and satisfactory completion, the plaintiff tendered for the work, and the council, having resolved that his tender should be accepted, directed their clerk to write to

Acceptance
of a tender
by a local
authority.

(i) 3 Q. B. D. 667.

(k) See per Cotton, L.J., *ib.*, at p. 672 in the L. R. *Guardians of Kingston-upon-Hull v. Petch*, 10 Ex. 610; and see *Chinnock v. Murchioness of Ely*, 4 D. J. & S. 633, per Lord Westbury; *Rossiter v. Miller*, 3 App. Cas. 1124, and the numerous cases there cited. *Bonnewell v. Jenkins*, 8 Ch. D. 70; *Hussey v. Horne-Payne*, 4 App. Cas. 311. See *Navan Union v. McLoughlin*, 4 Ir. C. L. R. 451.

(l) L. R. 7 Ch. D. 29. See, however, *Eadie v. Addison*, 52 L. J. Ch. 80; and see *Harvey v. Barnard's Inn*, 50 L. J. Ch. 750; *Wood v. Silcock*, 50 L. T. 251.

(m) L. R. 7 Ch. D. at p. 32, applied in *Clark v. Robinson*, 51 W. R. 413, and discussed in *Watson v. McAllum*, 87 L. T. 547.

(n) *Bozson v. Altrincham U. D. C.*, 67 J. P. 397.

the plaintiff to that effect, and to affix their seal to the letter. It was held that the acceptance of the tender did not conclude a contract between the parties. This decision, however, was partly based on the fact that, by the Public Health Act, 1875, s. 174, a contract made by an urban authority whereof the value or amount exceeds £50 must be in writing and sealed with the common seal of that authority. Lord Halsbury, C., in the course of his judgment, pointed out that if the members of the council had been individuals contracting on their own account, the unqualified acceptance of the terms proposed would have made a contract.

Whether the advertisement inviting tenders for building amounts to an express offer.

An advertisement offering goods for sale by tender does not import a promise to sell to the person who made the highest tender or to accept any tender. (o) Of course, the advertisement inviting tenders for building might contain words amounting to such an express offer as would be made binding by an unqualified acceptance by tender. But in advertisements for tenders for buildings, it is usual to reserve the right of rejecting all tenders or of accepting any tender without restriction.

Insertion of new term in acceptance.

Where the defendant offered to purchase a house upon certain terms, "possession to be given on or before July 25," and the plaintiff agreed to the terms, and said he would give possession on August 1, it was held there was no acceptance of the defendant's offer. (p)

Limitation of time for acceptance.

A stipulation that the builder whose tender is accepted shall be informed of the fact within a certain period from the date of lodging estimates, and that during that period the builders making tenders shall be bound to abide by their estimates, cannot be enforced unless the day for lodging estimates is fixed. Thus in an action for implement (for specific performance) of a contract constituted by an offer to execute certain mason-work for a certain sum, and acceptance thereof within eleven days of the date of the offer, the defender relied upon one of a number of "conditions of tendering" agreed to by the architects in Aberdeen and the Master Masons' Association, of which he was a member. The condition relied on was "that architects shall within seven days either from date of lodging estimates (either by advertisement or otherwise) inform the contractors who have tendered for work as to who

(o) *Spencer v. Harding*, L. R. 5 C. P. 561. And see as to contracts generally by advertisement, *Williams v. Carwardine*, 4 B. & Ad. 621; *Thatcher v. England*, 3 C. B. 254; *Harris v. Nickerson*, L. R. 8 Q. B. 286; *Richardson v. Silvester*, L. R. 9 Q. B. 34; *Warlow v. Harrison*, 1 E. & E. 295; *Mainprice v. Westley*, 6 B. & S. 420; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256.

(p) *Routledge v. Grant* (1824), 4 Bing. 653.

has been successful, and that contractors shall be held bound to abide by their estimates for the same time." No date was specified by the pursuer for the lodging of estimates. It was held that, whether or not these conditions might otherwise enter into the contract between the pursuer and defender, the contract in question had no application thereto, being designed to meet a state of matters where one definite date was fixed for the lodging of all estimates. (g)

In cases where the building owner does undertake to accept the lowest tender, the meaning of this term may have to be considered. It seems that a tender to the effect that "I offer £100 less than any other builder who makes you a tender" would not be the lowest tender. In *South Hetton Coal Co. v. Haswell, etc., Co.*, (r) the owner of certain coal-mines proposed to receive sealed tenders from two parties who were competing for the purchase of the mines, and undertook to accept the "highest net money tender." One of the competitors offered such a sum as would exceed by £200 the amount offered by the other. It was held that a tender in this form did not answer the description of "the highest net money tender."

A proposal to receive tenders for certain building materials which were to be sold (specifying no limitation or qualification), and an acceptance (also specifying no limitation or qualification), were held to be a contract for the whole. Thus, an advertisement in the words following: "Old Westminster Bridge. Offers will be received for the old Portland stone, Bramley Fall stone, etc.," followed by an acceptance, was construed as a contract for the whole. (s)

A person inviting tenders may revoke his invitation; and the expenses of making a tender cannot be recovered if the invitation is withdrawn. (t)

A tender may be withdrawn at any time before acceptance. (u)

An agreement between builders to the effect that one of them was to tender at a low price, two at higher prices, and that one

(g) *Murray v. Rennie and Angus* (1897), 34 S. L. R. 709.

(r) (1898) 1 Ch. 465.

(s) *Thorn v. The Commissioners of Public Buildings*, 32 Beav. 490. The evidence shows that, according to the custom of the trade, when old materials of a building are offered for sale without reserve as to quantity, the whole is understood by vendor and purchaser to be included in the offer to sell, and the whole is understood in like manner to be included in the tender to purchase. *Ib.*, 496. *Sed quære.*

(t) See *Harrie v. Nickerson*, L. R. 8 Q. B. 286, *supra*.

(u) *Routledge v. Grant* (1828), 4 Bing. 653.

was not to tender at all, was held to be valid and enforceable *inter se.* (w)

(5) EFFECT OF ACCEPTANCE OF TENDER.

Offer to
supply
quantities
"as re-
quired."

When tenders are advertised for to supply goods or for the performance of work, and a tender offering to supply the goods, or do the work, in such quantities and at such times as might be ordered, is accepted, there is a sufficient consideration for the promise, although there is no binding contract on the part of the person accepting the tender to order anything; and the tenderer is bound to supply the goods or perform the work upon any order being given. (x)

In cases where tenders are invited for the supply of building or other materials, the persons inviting tenders do not always know how much will be required. In the *Attorney-General v. Stewards & Co.* (y) the Admiralty had invited tenders for the supply of cap and roach stone, lying in rough stacks in certain quarries, "in such quantities and at such times as may be required by the Admiralty." The defendants had intimated that they could supply 2,000,000 tons, but in the acceptance of the tender by the Admiralty there was no undertaking to accept 2,000,000 tons. It was held that the Admiralty were under no contractual obligation to take 2,000,000 tons of stone, but only such stone as they might from time to time require. A tender to supply goods at certain prices during twelve months is a continuing offer, which, if accepted by ordering goods under it, becomes a binding contract to supply those goods, although the party accepting the tender is under no obligation to order goods (z).

(6) FRAUD IN MAKING OR INVITING TENDER.

Where contractors obtain the acceptance of their tender by offering a bribe or commission to the employer's architect or other agent, the employer can either have the contract set aside, or, if he has allowed the contract to go on, he may besides recovering the bribe from the architect recover damages from the contractor who has paid the bribe. (a) Where the party inviting tenders is

(w) *Jones v. North* (1875), L. R. 19 Eq. 426.

(x) *G. N. Ry. Co. v. Witham*, L. R. 9 C. P. 16. See also the Australian case of *Colonial Ammunition Co. v. Reid* (1900), 21 N. S. W. Rep. 338.

(y) (1901) 18 T. L. R. 130.

(z) *Reg. v. Demers* (1900), A. C. 103.

(a) *Salford (Mayor of) v. Lever* (1891), 1 Q. B. 168.

guilty of misrepresentation, which is material and induced the tender, the party inviting the tender is liable, so long as the contract remains unperformed, to an action for its rescission (*b*). If the misrepresentation is fraudulent he is liable to an action for damages for deceit.

(7) ARCHITECT PROCURING TENDERS.

If the architect has procured tenders in accordance with the instructions of his employer, it is customary to allow him an additional half per cent. on the estimated cost of the building. (*c*)

(8) SALE BY AUCTION.

An advertisement of a sale by auction does not constitute a contract, with a person attending the sale, that all the lots advertised should be put up for sale. (*d*) But an advertisement of a sale, knowingly made without any power or intention of carrying it out, may be ground for an action for fraudulent misrepresentation at the suit of a person who acts upon it, and incurs expense in inspecting and valuing the property. (*e*)

He who purchases an estate by auction should exercise considerable care, for the moment the property is knocked down to the purchaser there is a contract. (*f*)

SECT. II.—SURETIES TO BUILDING CONTRACTS. (*g*)

Where building contracts are for the erection of extensive works, it is usual to obtain security for the proper performance of the work, and it will be convenient here to refer shortly to such arrangements.

(1) CONDITION PRECEDENT TO EMPLOYER'S LIABILITY.

If the builder is to give security for the due performance of his contract, the giving of the security is a condition precedent to any

b) *Ormes v. Beadell* (1861), 30 L. J. Ch. 1.

c) Schedule, R. I. B. A. revised, 1898, r. 5.

d) *Harrie v. Nickerson*, L. R. 8 Q. B. 286.

e) *Richardson v. Silvester*, L. R. 9 Q. B. 34. Fraud must, however, be proved, *Derry v. Peek*, 14 A. C. 337; *Le Lievre v. Gould*, [1893] 1 Q. B. 491. See *Warlow v. Harrison*, E. & E. 295; *Muinprize v. Westley*, 6 B. & S. 420. As to advertised sale "without reserve," see the Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48, s. 5.

f) *Tumplin v. James*, 15 Ch. D. 215.

g) See, generally, *The Law of Principal and Surety*, by S. A. T. Rowland 1899; *Law of Guarantees*, by H. A. De Colyar (3rd ed.), (1897).

liability on the part of the employer upon the contract, unless the condition has been waived by the builder being required to proceed with the work, or the work having been executed without security. (*h*)

(2) DISCHARGE OF SURETY.

How surety will be discharged, generally.

A surety is discharged from liability if a new agreement with the builder, in variation of the original contract, is made, which is equivalent to a discharge of that contract, and a substitution of a new contract in its place; and he is not affected with any liability in respect of the substituted contract, unless, with full knowledge of all the circumstances, he consent to continue surety under it. (*i*)

Where a bond had been given by a surety for the performance of the "promises and agreements" in a contract for works "which on the part of the contractor were or ought to be performed, according to the true intent and meaning of the contract," and the employer advanced to the contractor the retention money provided for by the contract, the surety was held discharged. (*k*)

The appointment of a new architect may operate to discharge a surety. In *Stiff v. Eastbourne Local Board* (*l*) a surety who guaranteed the execution of a contract to the satisfaction of the surveyor of the defendant board was relieved by the non-disclosure to him of the fact that the board had arranged with the Duke of Devonshire that the Duke's surveyor should have joint control of the work.

Discharge of surety on "completion" of the work.

As completion of the work to be performed under the contract usually discharges a surety, it may be necessary to consider what constitutes completion.

In *Lewis v. Hoare*, (*m*) money was advanced on a guarantee to

(*h*) *Roberts v. Brett*, 6 C. B. N. S. 635; 11 H. L. C. 337; *Kingston v. Preston*, *Addison on Contracts*, 10th ed. (1903), p. 816. See *Andrews v. Lawrence*, 19 C. B. N. S. 768, as to becoming security for payment according to building contract. As to contribution between co-sureties, see *Steel v. Dixon*, L. R. 17 Ch. D. 825; *Ellesmere Brewery Co. v. Cooper* (1896), 1 Q. B. 75, *post*. See the Precedents, F. XV., *post*, p. 400, for a form of a Bond.

(*i*) *Whitcher v. Hall*, 5 B. & C. 269; *Rees v. Berrington*, 2 Ves. Jun. 540; See *per Cur.* in *Petty v. Cooke*, L. R. 6 Q. B. 794; *R. v. Herron and Another* (1903), 2 Ir. R. 474. As to co-sureties, see *Ward v. National Bank of New Zealand*, L. R. 8 App. Cas. 755; and as to death of one co-surety, see *Beckett v. Addyman*, L. R. 9 Q. B. D. 783.

(*k*) *Culbert v. London Dock Co.*, 2 Keen, 638.

(*l*) (1868) 19 L. T. 408; see also *R. v. Herron and Another* (1903), 2 Ir. R. 474.

(*m*) (1881) 44 L. T. 66.

be repaid on the completion of six houses in accordance with a contract. One of the terms of that contract was that the houses were to be built to the satisfaction of a surveyor, and payment made on his certificate. The houses were in fact completed, though no certificate of completion had been obtained. It was held that "completion" in the guarantee meant completion in fact, and that they were none the less complete in spite of the withholding of the certificate.

If the employer does any act injurious to the surety, or inconsistent with the right of the latter, or if he omits to do any act which his duty enjoins him to do, and the omission prove injurious to the surety, the latter may be discharged; (*n*) thus, where by the contract between the builder and the employer the latter agreed to insure the work from fire during its progress, which he failed to do, and the work was burned, and the completion of it was thereby prevented, the surety was held discharged. (*o*) So, where instalments of the price were paid before the work was done for which they were due, the surety was discharged. (*p*) And where the defendant executed a bond of guarantee for advances to be made to a third party, upon the faith that no advances were to be made beyond the limit of the guarantee, he was held discharged by advances being made to a greater amount. (*q*)

But a surety for a contractor is not discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor, against which the surety has, by the contract of suretyship, guaranteed the employer. (*r*) Thus, where the sureties contracted with the employers that the contractors would "well and truly" execute the works, and the contract gave the employers a right of superintending the works, through their engineer, and provided for the retention of a certain percentage of the contract price until a final certificate should be given by such engineer six months after his certificate of completion of the works, and portions of the work were defectively done and fraudulently concealed, the final certificate was given and the retention money paid, and in an action against the sureties it was found that the certificate was obtained by fraud, but also that there was an

When position of surety altered by employer.

Fraud, or omission of contractor.

(*n*) Story's Eq. Jur. (1886), sec. 325; *Watts v. Shuttleworth*, 5 H. & N. 285; and see *Black v. Ottoman Bank*, 10 W. R. 871, P. C.

(*o*) *Watts v. Shuttleworth*, *supra*.

(*p*) *General Steam Navigation v. Rolt*, 6 C. B. N. S. 550.

(*q*) *Gordon v. Raz*, 8 E. R. 1065.

(*r*) *Kington-upon-Hull Mayor of v. Harding*, [1892] 2 Q. B. 494.

Sureties not
discharged
by final
certificate.

omission on the part of the employers to properly superintend the work which led to the scamping of it; the sureties were held liable on the ground that the mere non-superintendence was not a dereliction of any duty owed by the employers to the sureties, and therefore did not relieve them. Nor were they discharged by the fact that the engineer had given his final certificate although the work was not properly done, or that the retention money had been paid thereon, as the mere giving of the certificate was not shown to have altered the position of the sureties for the worse, and both that and the payment of the retention money were procured by a dishonest execution of the work, against which the sureties had guaranteed the employers. (s)

The true doctrine on this subject is this: mere omission on the part of the employer, or mere passive acquiescence in acts which are improper on the part of the builder, will not release the surety; but, if there be an omission to do some act which the employer has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled, the case is different. (t)

Creditor
giving time.

Again, if the creditor enters into a binding contract with the principal to give him time for the performance of his contract, without the assent of the sureties, and without reserving his remedy against the sureties, such giving of time discharges the sureties (unless the sureties have agreed that they shall not be released from their liability by reason of time being given to the debtor). (u) But to produce this result, two things are necessary. There must be a binding contract to give time, capable of being enforced; and the contract must be with the principal. (w)

Judgment
against prin-
cipal not
binding on
surety.

In the absence of special agreement, a judgment or an award against a principal is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal. (x)

Rights of
surety where
contractor
becomes
lunatic.

Where a contractor, who had partially completed his contract, became of unsound mind, the surety was called upon to complete

(s) *Ib.*

(t) *M'Taggart v. Watson*, 3 C. & F. 525; *Dawson v. Lawes, Kay*, 280; *Durham (Mayor of) v. Fowler*, 22 Q. B. D. 394; *Taylor v. Bank of New South Wales*, 11 A. C. 596; *Pearl v. Deacon*, 24 Beav. 186.

(u) *Greenwood v. Francis* (1899), 1 Q. B. 312.

(w) *Samuell v. Howarth*, 3 Mer. 272; *Frazer v. Jordan*, 8 E. & B. 303; *Clarke v. Birley*, 41 C. D. 422; *Bolton v. Buckenham*, [1891] 1 Q. B. 278; *Bolton v. Salmon*, [1891] 2 Ch. 48.

(x) *Ex parte Young, In re Kitchen*, L. R. 17 Ch. D. 668.

the work. In an action brought by him against the committee of the lunatic for work and materials, it was held in the Irish Court of Appeal that the contract was not terminated by the lunacy of the contractor, and that the surety was entitled to recover the cost of completing the contract from the committee. (*y*)

(3) LIABILITY OF Co-SURETIES.

Where there are co-sureties, and the same default of the principal renders them all responsible, all are to contribute, and all should contribute equally if each is surety to an equal amount, and if not equally, then proportionately to the amount for which each is surety. (*z*)

(4) CONTINUING GUARANTY.

A continuing guaranty under seal, where the consideration is given once for all, is not determined by the death of the guarantor, nor by the fact that his death has come to the knowledge of the person to whom the guaranty is given. Such a guaranty cannot be determined by the guarantor or his executors upon notice, unless there be an express stipulation to that effect. (*a*)

(5) SURETIES IN CONTRACTS WITH LOCAL AUTHORITIES.

The question of sureties is of particular importance where contracts are entered into between builders and local authorities. Thus urban sanitary authorities are directed to require and take sufficient security for the due performance of any contract into which they enter to the value or amount of £100 or upwards. (*b*). Again, in a contract with guardians of the poor, a builder *may* be required to find security. (*c*) Cases may arise in which it may be expedient for a builder to have security for the payment of the contract price.

(*y*) *Tracy v. McCabe* (1893), 32 L. R. (Ir.) 21.

(*z*) *Ellesmere Brewery Co. v. Cooper* (1896), 1 Q. B. 75; and see *Steel v. Dixon*, L. R. 17 Ch. D. 825; see further as to co-sureties, *Fitzgerald v. McGowan* (1898), 2 Ir. 1; *re Gervais* 1903, 1 Ir. R. 173.

(*a*) *Craze, In re; Balfour v. Craze* (1902), 1 Ch. 733.

(*b*) Public Health Act, 1875, s. 174 (4). Having regard to the case of *British Insulated Wire Co. v. Prescott U.D.C.* (1895), 2 Q. B. 463 (which related to penalties), this provision may be regarded as mandatory.

(*c*) General Poor Law Order, 1817.

CHAPTER V.

THE CONTRACT TO BUILD.

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SECT. I.—GENERAL OBSERVATIONS ON BUILDING CONTRACTS.

(1) FORM OF CONTRACT.

Contract to
build need
not be in
writing.

A CONTRACT to build a house, or the like, and to provide materials for the purpose, need not, it seems, be in writing, unless it is not to be performed within a year. Such a contract is clearly not a contract relating to land or for the sale of goods within the provisions of the Statute of Frauds, (*a*) nor the Sale of Goods Act, 1898, sect. 4; (*b*) a contract to build a house, or the like, not being in law a contract for the sale of goods, even as regards the materials, but being an entire contract for work and materials. (*c*)

(*a*) 29 Car. 2, c. 3, s. 4.

(*b*) 56 & 57 Vict. c. 71.

(*c*) See *Lee v. Griffin*, 1 B. & S. 272; *Clay v. Yates*, 1 H. & N. 73. As to a building contract not constituting a partnership, see *Kelly v. Scotto*, 49 L. J. Ch. 383, and *post*, p. 133.

While a building contract need not be in writing, inasmuch as the builder has no right in the land, (*d*) a contract for the sale of the "building materials" of a house—with a condition that all materials are to be taken down and cleared off the ground within two months, "after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access shall absolutely cease"—is a contract for the sale of an interest in land within sect. 4 of the Statute of Frauds. (*e*)

Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing, as a draft, has not been formally executed by either. In such a case the word "approved," written by one of the parties at the end of the draft agreement, must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form. (*f*) But where parties entered into a preliminary building agreement, intending to execute a more complete and formal contract, Bacon, V.C., refused either to decree specific performance of the agreement or to give damages for its breach; (*g*) and in another case (*h*) the Court refused specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract."

A mere assent to the terms to be stated in a proposed contract would not be binding, but acting upon those terms may be sufficient to show the adoption of the writing, and to constitute it a valid contract. The onus, however, of showing that both parties have acted on the terms of an agreement which has not been, in due form, executed by either, lies upon the party who rests his case on that circumstance. (*i*)

In practice, however, the contract is always in writing, and its terms will depend upon the extent of the works to be executed. It is unfortunately the case that building agreements are frequently prepared by persons who have not sufficient knowledge of the law bearing upon the various clauses required, and of the dangers to

(*d*) *New River Company v. Midland Railway* (1877), 36 L. T. N. S. 539, per Bramwell, L.J., at p. 540.

(*e*) *Lavery v. Pursell*, 39 Ch. D. 508.

(*f*) *Brogden v. Metropolitan Ry. Co.*, L. R. 2 Ap. Cn. 666. See, however, *Radie v. Addison*, 52 L. J. Ch. 80. See *Winn v. Bull*, L. R. 7 Ch. D. 29, ante, p. 21, and *Harvey v. Barnard's Inn*, 50 L. J. Ch. 750.

(*g*) *Wood v. Silework*, 50 L. T. 251. But where the work is clearly defined, see post, Chap. XVI., as to specific performance. As to remedy in case of mistake, see *Puget v. Marshall*, L. R. 28 Ch. D. 255.

(*h*) *Harvey v. Principal and Ancients of Barnard's Inn*, supra.

(*i*) Per Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*, L. R. 2 A. C. 666, supra. See *Preston v. Luck*, L. R. 27 Ch. D. 497.

which their clients may be exposed. It will not be necessary here to refer to the clauses which a building contract should contain, or to point out what forms should be avoided, as these matters will be dealt with in the following chapters. Great care should be taken not to adopt a loosely-drawn or ill-considered form of contract. In particular, it often happens that a so-called "usual form" contains clauses as to extras which leaves the employer open to endless expense and trouble.

(2) SPECIAL AND GENERAL CONDITIONS.

Contracts for extensive works frequently comprise the following documents: A, the agreement; B, the general building conditions; C, the specifications; and D, the schedule of prices. A form of such contract will be found at p. 391, *post*. Care should be taken that the agreement and the general conditions do not contain contradictory or ambiguous clauses.

Inconsistency
between
general and
special
conditions.

In a Canadian case (*k*) a contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same, it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: "In case the works, from the want of sufficient or proper workmen or materials, are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion, with the consent in writing of the Court House Committee (or Commission, as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor." It was held by the majority of the Court that this last clause was inconsistent with the clause in the contract, and that the latter must govern. The architect therefore had power to

(*k*) *Neelon v. Toronto (City)* (1895), 25 Can. S. C. Rep. 579.

dismiss the contractor without the consent in writing of the committee. (l)

(3) PAROL EVIDENCE WHEN CONTRACTS ARE IN WRITING.

"By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passes between the parties, either before the written instrument was made or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract." (m)

Common law rules.

Parol evidence may, however, be admissible to show that a signed document purporting to be an agreement is not a contract at all, no contract having in fact been concluded between the parties; (n) or to show that a contract is subject to a condition which suspends its operation. (o)

When parol evidence will be admitted.

Again, extrinsic evidence is admissible to show that the parties to the written agreement have contracted upon a common basis of usage or custom applicable to the building trade; or evidence of usage is also admissible to show that words or phrases have a special meaning in the building trade, whether such words are words having a purely local or a technical meaning. The evidence of usage will not be excluded because the words are in their ordinary meaning unambiguous; the principle is, that words, perfectly unambiguous in their ordinary meaning, may be used by the contractors in a different sense from that.

Custom or usage.

So a building contract, stipulating for "weekly accounts" of the work done, was construed according to the usage of the building trade, and meant accounts of day work only, and not of the measurement work. (p) But, though parol evidence of usage may be admissible to explain what is doubtful, it is not admissible to contradict or vary what is plain. (q) And where a contractor, by an agreement in writing, agreed to win stones, "for the purposes

Illustrative cases.

(l) See also, as to inconsistent provisions, the American case of *Morrill v. Whiten Construction Co.* (1904, 186 Mass. 217.

(m) *Goss v. Lord Nugent*, 5 B. & Ad., 58, per Denman, C.J., at p. 64.

(n) *Pattle v. Hornibrook* (1897), 1 Ch. 25, following *Furness v. Meek*, 27 L. J. Ex. 34.

(o) *Pym v. Campbell*, 6 El. & Bl. 370.

(p) *Myers v. Sirl*, 30 L. J. Q. B. 9.

(q) *Ib.*; per Cur. in *Brown v. Byrne*, 3 E. & B. 716; *Mallan v. May*, 13 M. & W. 517. See as to written contracts and evidence of usage, etc., *Taylor on Evidence*, vol. ii. (9th ed.), § 1165, et seq.

As to parol evidence of the signature by an agent both for the principal and in his own right, see *Young v. Schuler*, 11 Q. B. D. 651.

Plans forming part of contract.

Meaning of "brick-built house."

"Substantial."

Agreement conditional on settlement of price.

Effect on contract of change in anticipated circumstances.

of building" certain cottages, parol evidence could not be given to explain the sense in which the word "building" was used. (*r*) As hereafter stated, (*s*) if an agreement refer to a plan, parol evidence is admissible to show the identity of the plan. (*t*)

A house described as "brick-built" is understood to be brick-built in the ordinary sense of the words; not composed externally partly of brick, and partly of timber and lath and plaster; (*u*) but the description of a house as "substantial and convenient" is merely relative, and, where this expression was used, a purchaser was held to his bargain, although one of the external walls was only half a brick in thickness. (*x*) Although that was a case of construction of particulars of sale, yet it shows the danger of meagre descriptions in writing of the work to be executed.

Upon an agreement to do work at a measurement price, to be settled by a person named in the agreement, the settlement of the price is a condition precedent by which the parties are bound, and not a mere reference to an arbitrator which can be revoked. (*y*)

When a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to, or impossible of application to, any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. (*z*) Where a contract was made in the month of June, for the execution of certain works for a water company within four months, the company contracting to be ready at all times to give possession of the sites, and, by reason of the company's delay in giving such possession, the work was thrown into the winter months, when wages were higher and the works were more difficult to construct, it was held, that a summer contract having, by implication, been in the contemplation of the parties when the contract was made, the contractor was entitled to a *quantum meruit*, or damages in respect of the increased expenditure which he was compelled to incur. (*a*)

(*r*) *Charlton v. Gibson*, 1 C. & K. 541. See *Bacon Life and Fire Assurance Co. v. Gibb*, 1 Moore, P. C. C. N. S. 73.

(*s*) See *post*, p. 63, as to plans.

(*t*) *Hodges v. Horsfall*, 1 R. & M. 116.

(*u*) *Powell v. Double*, Sug. 29 (14th ed.).

(*x*) *Johnson v. Smart*, 2 Giff. 151. See *post*, p. 202.

(*y*) *Mills v. Bayley*, 2 H. & C. 36.

(*z*) *Jackson v. Union Marine Insurance Co.*, L. R. 8 C. P. 572. See also *Chandler v. Webster* (1904), 1 K. B. 493, and other cases cited *post*, p. 195.

(*a*) *Bush v. Trustees of Town, etc., of Whitehaven*, 52 J. P. 392; cf. *Drew-Bear v. St. Pancras Guardians*, Appendix, p. 681.

(4) DIVIDED CONTRACTS.

Where a church or other building is to be erected by a committee formed for that purpose, it is sometimes expedient to modify the contract so as to divide a large work into stages or sections, at which the committee may stop if funds are not provided for going on. In that case it is fair to the contractor that the committee should be bound to say within some reasonable time after the first section is completed whether they require him to go on.

(5) DUTY OF PARTIES TO BUILDING CONTRACTS.

(a) *Duty independently of Special Stipulations.*—Wherever there are concurrent obligations as between two contracting parties, the party who seeks to recover against the other must show that he himself has always been ready and willing to perform the obligation resting upon him. (b)

(b) *Duty of the Builder.*—Apart from special provisions in the contract, a builder, who has contracted to do certain work, is bound to enter upon his employment without delay; to be active, industrious, careful, and diligent in the performance of the work; to do it according to orders given and assented to; (c) to complete it within a reasonable period, if no precise time has been agreed upon for its fulfilment; and to exercise a reasonable amount of care and skill in its execution. (d)

If a man contract with another to build him a house for a certain sum, it will not be sufficient for him to show that he has put together such a quantity of brick and timber; he must be prepared to show that he has done the stipulated work according to his contract (e) in a proper and workmanlike manner.

Building contracts usually contain a clause to the effect that if any bad work or defect shall be discovered within a given time after the completion of the work, the builder must make good all such bad work or defects. A provision of this character extends only to bad work and defects which arise owing to the builder scamping his work; it does not enable the employer to insist that the builder shall remedy defects which are inherent in the design of the work undertaken. (f)

Where the contract provides that no final or other certificate

(b) *Forrest v. Arramayo*, 83 L. T. 335.

(c) *Streeter v. Horlock*, 7 Moore, 287.

(d) *Addison on Contracts* (1903), p. 822.

(e) See per Le Blanc, J., in *Basten v. Butter*, 7 East, 484.

(f) See *Roux v. Colonial Government* (1901), 18 S. C. (Cape of Good Hope) Rep. 143. See F. VII., Cl. 13, *post*, p. 321.

Duty to
remedy de-
fects after
completion.

Liability for
deviations.

shall relieve the contractor from any fraud or wilful deviation from his contract, but that he shall remain liable for a certain number of years for such acts, the employer cannot recover damages for such deviations unless he prove something in the nature of deliberate "scampering." (*f*) Minor deviations, or deviations which could have been prevented by proper supervision on the part of the employer or his agents, will not render the builder liable. (*g*)

Defective
materials.

Where the defendant, in building a house for the plaintiff, used mortar which was compounded otherwise than in accordance with the provisions of the London Building Act, 1894, (*h*) in consequence of which the plaintiff was compelled to pull down and rebuild, it was held that the plaintiff was entitled to recover all the cost of pulling down and rebuilding, and damages for the loss of ground rent. (*i*) This decision was based on the fact that the plaintiff had no reasonable opportunity of inspecting and rejecting the mortar before it was used.

Obligation
to build.

An ordinary building contract imports an obligation to build either within the time stated or within a reasonable time. There are certain other contracts upon which a question may arise as to whether they import an obligation to build. Thus in *Morell v. New London Discount Company*, (*j*) the plaintiffs and defendants entered into an agreement which contained a recital that the defendants had purchased some land and were intending to build a theatre thereon, and by which it was agreed that the plaintiffs should contribute in a certain proportion towards the expenses of building, and should become managing directors of the theatre at a salary for a term of years. A considerable sum having been expended by the defendants on the building of the theatre, towards which the plaintiffs contributed in accordance with the agreement, the defendants went into liquidation. The plaintiffs sued for damages for breach of agreement, and in the alternative for the return of money paid on a consideration which had failed. It was held that the defendants were not bound to build the theatre, inasmuch as they had not taken upon themselves any such obligation in express terms and the law would not impliedly place them under that obligation.

(*f*) *School Board for London v. Johnson*, Appendix, p. 665.

(*g*) *Ib.*

(*h*) See Byelaws made by the County Council under s. 16 of the Met. Man. Act, 1878, *post*, p. 642.

(*i*) *Smith v. Johnson*, Appendix, p. 668.

(*j*) 18 T. L. R. 507.

(c) *Duty of Employer*.—There may be an implied contract on the part of the employer, which is not part of or necessarily connected with the contract in writing, to do certain things previous to the building operations; and the builder will be entitled to recover damages from the employer, if he is prevented from proceeding with the work owing to unreasonable delay by the latter in doing such things, without which the building operations could not proceed. (k) The proper measure of such damages would be the loss which the builder had unavoidably sustained in consequence of such unreasonable delay. (l)

Where, for instance, the building owner fails to give the builder possession of the site at the time stipulated in the contract, the builder will be entitled to recover damages as for breach of contract. (m)

Failure to give possession of site.

(6) CLAUSE REFERRING DISPUTES TO THE ARCHITECT.

The custom of appointing the architect of the employer as arbitrator, which is almost universal, is very dangerous for the builder, inasmuch as the questions which are likely to arise for arbitration are generally questions which the architect, in the course of his employment, has already had to consider and to form some judgment upon; but the builder having agreed that the architect shall be arbitrator, cannot object to him on the grounds that he might, under the circumstances, be suspected of bias towards his employer, and this is so, even if under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employer in respect of the carrying out of the contract. (n)

Danger of such a clause.

It may seem to be strange that the law should sanction what amounts to a reference to the agent of one party to the contract; but it has even been decided that the parties to a contract may agree to refer all disputes to the final decision of one of such parties.

Parties to a contract may agree that the decision of one shall be binding.

In a Scotch case, (o) it was held that a reference to one of the

(k) *Lawson v. Wallasey L. B.*, 52 L. J. Q. B. 302; and in court of first instance, 11 Q. B. D. 229; *Bush v. Trustees, etc., of Whitehaven*, 52 J. P. 392.

(l) *Ib.*

(m) *See Drew-Bear v. St. Pancras Guardians*, Appendix, p. 681.

(n) *Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238; *Eckersley v. Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667; *Ives and Barker v. Willans*, [1894] 2 Ch. 478; *Re Donkin and the Company of the Proprietors of Leeds Canal*, 9 T. L. R. 192.

(o) *Buchan v. Melville* (1902), 39 S. L. R. 398.

parties to a contract of all disputes having relation to or arising out of the contract is legal and binding and must receive effect, provided that the other party, when agreeing to the reference, was aware of the proposed arbitrator's interest. (*p*)

It has been held, moreover, that where the certificate of the architect is to be conclusive evidence of the works having been duly completed, the architect is in the position of an arbitrator, and is not liable in an action for negligence in giving certificates for work done. (*q*)

When submission to architect will be revoked.

In certain circumstances the submission to the architect as an arbitrator may be revoked by the Court, as where other matters likely to pervert his judgment arise, or are discovered after the contract has been entered into.

Thus where there was litigation commenced by the arbitrator showing "some warmth of feeling" between him and one of the parties to a submission, although the litigation arose at a period long subsequent to the date of the submission, and in respect of matters wholly unconnected with it, the Court revoked the submission. (*r*) But the mere fact that the builders, or those claiming through them, bring an action against the architect charging him with fraud in relation to the contract, does not entitle them to revoke the submission. (*s*)

If, during the progress, or on the completion of, the building operations, the employer and builder wish to submit any particular disputes to arbitration, they are always free to enter into an agreement for this purpose. (*t*)

(*p*) In that case the arbitration clause was in the following form: "In case of any dispute arising between the proprietor and the contractor having relation to or arising out of the contract during the work or after completion, whether with reference to the execution of any part of the work as to the true intent and meaning of these presents, or the settlement of accounts, or to anything else, whether executorial or non-executorial, the same shall be referred to [the defendant, naming him] architect, whose decision will be final and binding on all parties without further appeal." The 17th clause provided that, "It is specially conditioned that the architect shall not be disqualified by being the employer." Citing a passage from *Russell on Arbitration* (8th ed.), p. 81, the Lord President pointed out that the decision of the Court appeared to accord with English law.

(*q*) *Chambers v. Goldthorpe* (1901), 1 K. B. 624. See p. 84, *post*.

(*r*) *Baring Bros. & Doulton, In re*, 61 L. J. Q. B. 704. As to what will constitute *bias* in the architect or engineer, see the following Scotch cases: *Dickson v. Grant*, 8 Maeph. 566; *McDougall v. Laird*, 22 R. 71; *McLaughlan v. Morrison* (1900), 8 S. L. T. 279.

(*s*) *Belcher v. Roedean School Site and Buildings, Ltd.*, 85 L. T. 468, distinguishing *Baring Bros. & Doulton, In re*, 61 L. J. Q. B. 704, *supra*. See also on this point *Nuttall v. Mayor of Manchester*, 8 T. L. R. 512, and *Pawley v. Turnbull*, 3 Giff. 70.

(*t*) See form, *post*, p. 472. See also Arbitration Act, 1889.

Where a building contract contained a clause that all disputes and differences were to be referred to the decision of the architect appointed by the building-owners, and the builders issued a writ against the architect for damages for fraud and misrepresentation, and a summons was taken out by them to revoke the submission, and the architect declined to admit the charges made against him, it was held that an application to revoke a submission is one to be granted with great caution, and that the submission should not be revoked. (u)

Award of architect not lightly set aside.

Although a contract provides that the architect's decision shall be conclusive "on any difference concerning anything in connection with the contract," yet, if the dispute is one arising from a breach of an implied contract which is not part of or necessarily connected with the contract, such decision will not be binding. (v)

Reference clause not conclusive where breach not part of contract.

A stipulation that "should any difference arise between the proprietor and any of the contractors in regard to the true meaning of the plans, drawings, or specifications, or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted to the determination of W. H. B." (the proprietor's architect), "whose decision shall be final," does not include a dispute regarding the accuracy of the measurements of the work, obtained by the contractor for the plumber's work, after the building had been completed. (x)

Reference clause where dispute arises after the completion of contract.

SECT. II.—SUB-CONTRACTS.

(1) EMPLOYMENT OF SUB-CONTRACTOR.

If there is no stipulation against sub-contracting in the agreement, the contractor may, in general, enter into sub-contracts (y) for the completion of the work; but not where the contract is founded upon the personal skill and taste of the contractor. (z) The building contract, however, usually contains a clause to the

(u) *Belcher v. Roalean School Site and Buildings, Ltd.*, 85 L. T. 469.

(v) *Lawson v. Wallasey L. B.*, 52 L. J. Q. B. 302.

(x) *Beattie v. Macgregor*, 10 Ct. of Sess. Cas. 1091. See also *Tough v. Dumbarton, etc., Commissioners* (1872), 11 Ct. of Sess. Cas. (3rd ser. B. 236. As to damages for failure to deliver within stipulated time, and reference clause, see *Lery v. Thomson*, 10 Ct. of Sess. Cas., 1134 (s.c.).

(y) A form of sub-contract will be found at p. 399, *post*.

(z) See *post*, Chap. XII., p. 157, and case cited by Patteson, J., in *Wentworth v. Cook*, 10 A. & E. 45. See also *Robson v. Drummond*, 2 B. & Ad. 308; cf. *The British Wagon Co. v. Ince & Co.*, 43 L. J. C. L. 321; *Jäger v. Walker*, 77 L. T. 18; *Pothier, Louage*, No. 421.

effect that the builder shall not, unless with the written consent of the employer, employ a sub-contractor for the execution of the works, or any part thereof; but shall personally superintend the same. (a)

Consent of
employer.

Sub-contractors should be careful to see that the builder who employs them has obtained the necessary consent; but the sub-contract may provide, in effect, that the builder must obtain the consent.

It was held in a Canadian case (b) that where a contract with a municipal corporation provided that it should not be sub-let without the consent of the corporation, and the sub-contract contained a clause to the effect that it was made subject to all the terms and conditions of the head contract, it was held incumbent on the contractor to obtain the consent of the corporation before sub-contracting, and if he failed to do so he could not maintain an action against a proposed sub-contractor for not carrying out the portion of the work he agreed to do.

(2) TO WHOM ARE SUB-CONTRACTORS RESPONSIBLE.

Whether
builder is
agent to
employ sub-
contractor.

Where sub-contractors, or "specialists," are employed by a builder, a question sometimes arises as to how far they are directly responsible to the employer, and whether the employer is directly liable to them. This turns upon the question whether by virtue of the special terms of the contract between the employer and the builder, the builder was constituted the agent of the employer to employ the sub-contractor, or to purchase goods from him, and to establish privity of contract between the employer and such sub-contractor. Where the defendant (a building owner) entered into a contract with a builder, by which the latter agreed to build a house for him under the supervision of an architect, the contract provided that the provisional sums for goods to be ordered from special artists or tradesmen, should, as the architect should certify, be payable by the builder or the building owner. Special goods according to a particular design were ordered by the builder from the plaintiff, who was a metal worker, and the architect certified the sum for these goods as due from the defendant to the plaintiff, deducting the amount from the certificate given to the builder. It was held that the plaintiff was entitled to recover this sum direct from the building owner. (c) In this case the contract

(a) For a precedent of such a clause, see p. 378, *post*.

(b) *Ryan v. Willoughby* (1900), 31 Can. S. C. Rep. 33.

(c) *Hobbs v. Turner*, 18 T. L. R. 235.

between building owner and builder contained a clause to the effect that "the provisional sums mentioned in the specification for materials to be supplied or for work to be performed by special artists or tradesmen, or for other works or fittings to the building, shall be paid and expended at such time and in such amounts and to and in favour of such persons as the architect shall direct, and sums so expended shall be payable by the contractor without discount or deduction, or by the employer to the said artists or tradesmen." In the absence of such a clause, a specialist or sub-contractor would be compelled to look for his remuneration to the person who directly employed him, namely, the builder.

(3) DEFAULT OR DELAY BY SUB-CONTRACTOR.

The builder who employs a sub-contractor should be careful to make it clear that the sub-contractor shall be responsible for any default or delay which may render the builder himself liable to the building owner. The insertion of a clause to the effect that the sub-contractor must replace faulty work will go a long way towards protecting the builder. (*d*)

Where the employer or building owner reserves to himself the right of employing specialists to do certain portions of the work, he gives no implied undertaking to the builder that he will be responsible for any damage caused to the builder by any delay or default on the part of the specialists. So where there was a contract in writing, with specification annexed, made between a builder and building owners, the builder undertook to do the whole of certain work for a certain sum. Part of the work was to be done by specialists, who were to be appointed by the building owners, but were to be paid by the builder out of the contract price. The builder undertook to finish the work by a certain date, unless the works were hindered by (*inter alia*) delay on the part of the engineers or other specialists. The builder was not to be liable for any defects in works provided by the specialists, unless by reason of contributory negligence on his part, or his having paid any final balance to the specialists without first having the architect's written authority to do so. In the course of the work there was delay on the part of the specialists whereby the builder suffered damage. The builder brought an action for breach of

Employer
not impliedly
liable to
builder for
delay or
default of sub-
contractor.

(*d*) *Prince of Wales Dock Co. v. Fownes*, 90 L. T. 527. See, further, cases noted at p. 206, *post*.

contract against the building owners, alleging that under the contract and specification there was an implied promise on the part of the building owners that the delivery and pricing should be done at such reasonable times as to enable the builder to complete his work within a reasonable time thereafter, and that the building owners had broken one or both of these implied promises. It was held that on the proper construction of the contract and specification there was no such implied promise, and that there was no breach of contract on the part of the building owners, affording the builder a right to damages. (e)

Sub-contractors may be bound by the provisions of the head contract.

In a very recent case (f) the question was considered whether, in the circumstances which arose, the sub-contractors were bound by the retention-money clause in the head contract. The sub-contract provided (*inter alia*) that "the terms of payment for the work in question shall be exactly the same as those set forth in clause 30 of the said conditions of contract above referred to (meaning the head contract); and in fact we are willing and hereby agree to be bound in every respect by the whole of the terms, clauses, and conditions set forth in the said contract." It was held by the Court of Appeal that the moneys due under the sub-contract could be retained in the manner provided by the retention clause in the head contract.

Sub-contracts to comply with specification.

A recent American case illustrates the advantage of making a condition that the sub-contractor shall comply with the specification under which the builder himself is working.

The defendant contracted to construct a water reservoir, and sub-let the work of excavation to the plaintiff under a contract which required the plaintiff to perform his work as required in the specification. One clause of the specification provided that the vertical faces or cuts resulting from the excavation should be sustained by means of braces until the concrete walls were put up. It was held to be the plaintiff's duty to prevent the caving or sliding of the vertical walls before the completion of his work, and hence he was not entitled to recover for extra work in removing earth which slid into the excavation from the walls. (g)

(e) *Mitchell v. Guildford Union*, 68 J. P. 54, following *Leslie v. Metropolitan Asylums Board* (1896), 68 J. P. 86. For a case in which the sub-contractor was held not bound by the arbitration clause in the head contract, see *Goodwins v. Brand*, (1905) 7 F. 995 (Ct. of Sess.). See the Scots case of *Constant v. Kincaid* (1902), 4 F. (5th ser.) 901. See also an American case, *Reichenbach v. Sage*, 52 Am. St. Rep. 51.

(f) *Geary Walker & Co., Ltd. v. Lawrence & Son*, Appendix, p. 678.

(g) *Hely v. Hoertz* (1905), 82 S. W. 402; 26 Ky. L. R. 644.

(4) RIGHTS OF SUB-CONTRACTOR ON BUILDER'S BANKRUPTCY.

The rights of a sub-contractor upon the bankruptcy of the builder by whom he is employed are dealt with elsewhere. See *post*, p. 168.

SECT. III.—CONTRACTS BY OR WITH CORPORATIONS.

(1) GENERAL RULE THAT CONTRACTS MUST BE UNDER SEAL.

As corporations are frequently parties to building contracts, it will be useful to refer shortly to the formation of such contracts. A person contracting with a company must not imagine that his security is complete as soon as he has ascertained that the directors have power to enter into the contract. In many cases he must see that the seal of the company is affixed to the contract, as corporations at common law can in general only contract by instruments under seal. (*h*)

It is the general rule that a corporation can make a contract Exceptions. only by writing under seal, with certain exceptions, which may generally be referred to three classes, viz. (i) contracts authorised to be made without seal by the particular purpose and constitution of the corporation; or (ii) upon the general ground of convenience and necessity; (i) or (iii) contracts made on behalf of companies registered under the Companies Acts, or incorporated under statutes sanctioning other forms of contracts. (*j*)

For instance, as examples of the general rule, a municipal Illustrative cases. corporation was held not to be liable for the costs of certain building alterations and improvements in the borough, executed under an order given at a corporate meeting, and entered in the corporate books, but not under seal. (*k*) So, again, an agreement, confirmed by a resolution of the board of directors, for building cottages upon the land of a railway company, was disallowed, as no formal contract had been entered into. (*l*) So also was an

(*h*) Bacon, Abr. "Corporation." Com. Dig. "Franchise," F. 13. See cases collected in *Rivlinson's Municipal Corporations Acts* (1903), p. 74. As to contracts with urban authorities, see *post*, p. 48.

(*i*) 1 Black. Com. 475.

(*j*) The Companies Act, 1867 (30 & 31 Vict. c. 131, s. 37). The Companies Clauses Act (8 & 9 Vict. c. 16, s. 97).

(*k*) *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Mayor of Oxford v. Crow*, [1893] 3 Ch. 439.

(*l*) *Crompton v. Yarna Ry. Co.*, L. R. 7 Ch. 552; *Williams v. Chester and Holyhead Ry. Co.*, 15 Jur. 829; *Cope v. Thames Haven Dock Co.*, 3 Exch. 811; *Finlay v. Bristol and Exeter Ry. Co.*, 7 Ex. 409; *Frent v. Dennett*, 4 Jur. N. S. 897. Seal affixed without due authority, *D'Arcy v. Tamar Ry. Co.*, L. R. 2 Ex. 153; compare *Ex parte Contract Corporation*, L. R. 3 Ch. 105.

agreement with a railway company, made by a mere order of the secretary. (*m*)

Where work
necessary
and fully
executed.

But where the purposes for which a corporation is created render it necessary that work should be done to carry such purposes into effect, or where general convenience requires it, and the work is done, and the whole consideration for payment is executed, the corporation cannot, as a general rule, refuse to pay, upon the ground that the contract was not under seal; as, where a contract was entered into, not under seal, at a meeting of a board of guardians of a poor-law union, for the erecting of water-closets in the union. (*n*)

Engineer
preparing
plans.

So where a rural district council employed the plaintiff, though not under their common seal, as an engineer to prepare plans and do other work in connection with a sewerage scheme, which they were about to carry out, for a certain area; and the plaintiff duly did the work, and the council accepted it. In an action to recover remuneration for his work and services, it was held by the Court of Appeal, following *Clarke v. Cuckfield Union*, (*o*) that as the work and services had been accepted by the council, the law implied a contract to pay for them, and the absence of the seal was no answer to the claim. (*p*) Lord Justice Vaughan Williams said, (*q*) "In my opinion the decision in *Clarke v. Cuckfield Union*, and the decisions in the other cases decided upon the same lines, are to be preferred to the contrary decisions."

Architect
preparing
plans.

In *Start v. West Mersea School Board*, (*r*) an architect had been requested by a school board to prepare plans for the enlargement of a school, and to act as clerk of the works and superintend the construction of the building. He prepared plans, but the lowest

(*m*) *Diggle v. Blackwall Ry. Co.*, 5 Ex. 442; and see *London Dock Co. v. Sinnot*, 8 E. & B. 347.

(*n*) *Clarke v. Cuckfield Union*, 1 Bail C. C. 81. In *R. v. Mayor of Norwich*, 30 W. R. 752, the Court refused to disallow payments made out of the borough fund for work done, on the ground that the claim was unenforceable, because the contract for the work was not made under seal. *Sanders v. St. Neot's Union*, 8 Q. B. 810.

It has been held in an Irish case (*Holmes v. Trench* (1898), 1 I. R. 319) that the rule above formulated did not apply to a case where the power of the corporation to do the act was not to come into existence unless or until a certain prescribed condition had been performed by them which had not been performed.

(*o*) *Supra*.

(*p*) *Lawford v. Billericay R. D. C.* (1903), 1 K. B. 772. In this case s. 174 of the Public Health Act, 1875, did not apply, and the case therefore was free from the difficulties created by that section.

(*q*) At p. 781.

(*r*) (1899), 63 J. P. 440.

tender was for a larger sum than was estimated, and another architect was engaged who carried out the work. In an action by the first architect for professional services rendered, a jury found in his favour, but Wills, J., on further consideration, ruled that as the agreement was not under seal, the plaintiff was not entitled to recover. (s)

(2) EXTRAS WHERE THERE IS A CONTRACT UNDER SEAL.

A local authority has been held not liable for extra work done under a contract to build the union workhouse, although ordered by the architect and accepted by the guardians. (t)

That case, however, was apparently decided on the ground that the architect did not give written instructions in accordance with the contract; and in a later case it was decided that where an urban authority enters into a contract in writing, sealed with the common seal of that authority pursuant to sects. 173 and 174 of the Public Health Act, 1875, with a contractor, for the construction by him of sewerage works, with power to the engineer to vary, alter, and enlarge or diminish any of them, all variations and alterations coming within the terms of the power conferred on the engineer can be validly made without being under the common seal of the urban authority. (u)

Such extra work must, however, be done in accordance with the provisions of the contract. (v)

On the whole, it may be considered as open to doubt in many cases whether a corporation can be made liable upon contracts not under seal, even when the consideration of the contract has been executed for the benefit of the corporation. (x)

How far
corporation
liable when
the work has
been done.

(s) *Quære*, whether this can stand with *Lawford v. Billericay R. D. C.*, *supra*.

(t) *Lamprell v. Billericay Union*, 3 Ex. 283; 18 L. J. Ex. 282, noted at greater length, *post*, p. 71.

(u) *Williams v. Barmouth U. D. C.*, 77 L. T. 383; but see *Kellett v. Stockport Corp.*, 70 J. P. 151. For a form of clause providing that extras shall be ordered under seal, see *post*, p. 380.

(v) *Howersham v. Wolverhampton Waterworks Co.*, 6 Ex. 137; *Mayor of Luton v. Charlton*, 6 M. & W. 815, *supra*.

(x) *Hunt v. Wimbledon L. B.*, 4 C. P. D. 48. Per Brett, L.J.: "It is said that there is a rule that where orders are given by or on behalf of a corporation, and those orders result in an apparent contract, though not under seal, and the party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal. I doubt very much whether there is any such rule, either in law or equity." *Id.*, 56. *Young v. Mayor of Royal Leamington Spa*, L. R. 8 App. Cas. 517.

Seal affixed
after part
performance.

Where work was partly performed by engineers under a contract not under seal, and before the work was completed the corporation seal was affixed to the contract, it was held that the engineers were entitled to recover under the contract. (*y*) The case subsequently went to the Court of Appeal, and was overruled on another point; no opinion was expressed on the question of the seal. (*z*)

The rule in
equity.

The general rule, requiring the common seal in contracts to build by corporations, applies in equity as at common law. (*a*)

Part per-
formance and
acquiescence
of corpora-
tion.

As will be seen in the next chapter, where a landowner allows another man to spend money upon the land in the belief that he will have the profit, such conduct amounts to a contract by the landowner that the person who spends the money shall have possession of that on which the money is spent, and the enjoyment of the property he has so created. (*b*) Thus, where a person, under an agreement to let made by a resolution passed by a municipal corporation, entered into and built upon the demised premises, with the acquiescence of the corporation, they were compelled to grant a valid lease. (*c*) This equity equally avails in favour of a corporation. (*d*) But where the builder did not act in ignorance of the rights of the corporation or landowner, he could not claim compensation for having been induced to build on the land of the corporation. (*e*)

Where
builder is
not ignorant
of the rights
of the cor-
poration.

(3) CONTRACTS WITH COMPANIES.

Care neces-
sary in
dealing with
companies.

To architects, builders, and others dealing with companies, the following observations of Baron Martin in *Williams v. Chester and*

But see *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13; *Melbourne Banking Corporation v. Brougham*, L. R. 4 App. Cas. 156; *Mayor of Oxford v. Crow*, *supra*; see also *Arnold v. Mayor of Poole*, 4 M & G. 860; *Eaton v. Basker*, L. R. 6 Q. B. D. 201; 7 Q. B. D. 529; *Att.-Gen. v. Gaskill*, L. R. 22 Ch. D. 537. As to the liability for proportion of expenses of paving, etc., where contract is not under seal, see *Bournemouth Commissioners v. Watts*, L. R. 14 Q. B. D. 87, *post*, p. 626.

(*y*) *Melliss v. Shirley, etc.*, L. B., 14 Q. B. D. 911.

(*z*) 16 Q. B. D. 446.

(*a*) *Crampton v. Varna Ry. Co.*, L. R. 7 Ch. 562.

(*b*) See *post*, p. 60, *et seq.*, *East India Co. v. Vincent*, 2 Atk. 83; *Att.-Gen. v. Baliol College*, 9 Mod. 411; *Laird v. Birkenhead Ry.*, Johns. 500; *Wilson v. West Hartlepool Ry.*, 2 D. J. & S. 475. See *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13; *Mayor of Oxford v. Crow*, [1893] 3 Ch. 439. See also 1 Anstr. 185; Gilb. Eq. Rep. 85.

(*c*) *Crook v. Corporation of Scaford*, L. R. 6 Ch. 551. But see *Hunt v. Wimbledon L. B.*; *Mayor of Oxford v. Crow*, [1893] 3 Ch. 439; and cases, *supra*, with which it is difficult to reconcile the above decision.

(*d*) *London & Birmingham Ry. v. Winter*, Cr. & Ph. 57.

(*e*) *Crampton v. Varna Ry. Co.*, L. R. 7 Ch. 562, *supra*,

Holyhead Railway Co. (f) are very important, and should constantly be borne in mind when it is intended to enter into building contracts:—

“Persons dealing with these companies should always bear in mind that every such company is a corporation, a body essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials; and should insist upon these contracts being by deed under the seal of the company, or signed by directors in the manner prescribed by the Act of Parliament. There is no safety or security for any one dealing with such a body upon any other footing. The same observation also applies in respect of any variation or alteration of a contract which has been made.”

The result of the authorities as to contracts with companies would appear to amount to this, that any person dealing with a company should see—

Result of the authorities.

1st. That the contract is within the scope of the company's powers.

2ndly. That the directors, or other agents engaged in making the contract, are duly authorised by the company; and,

Lastly. That the contract is under the seal of the company, or in such other form as may be prescribed by Act of Parliament; or, if not, that the company is a trading corporation and the contract relates to matters necessarily incident to the purposes for which the corporation was created. (g).

In agreements between builders and persons having a corporate capacity, or trustees of building funds, it should be clearly stated whether the liability of the contracting parties is personal, or only extends to the amount of the fund of which they have to make use. But a contract by persons expressly restricting their liability to an alleged corporate capacity, not, in fact, having any such capacity, was held to bind them personally, the restriction being rejected as repugnant. (h) For a proviso which is in terms wholly repugnant to a covenant creating a personal liability is void; but a proviso only limiting the personal liability without destroying it is valid. (i) The contract may be so framed that the

Personal liability of parties contracting for corporations, or of trustees of building fund.

(f) 15 Jur. 829.

(g) See *Thring on Companies*, *Lindley on Companies*, and *Brice on Ultra Vires* (1893), 538, et seq.

(h) *Furnivall v. Coombes*, 5 M. & G. 736.

(i) See judgment, *Jessel, M.B.*, in *Williams v. Hathaway*, 6 Ch. D. 549, explaining *Furnivall v. Coombes*, *supra*. See *M. Collin v. Gilpin*, 6 Q. B. D. 516, as to words sufficient to make directors personally liable.

liability of the trustees of a building fund may be restricted to the period during which they are the trustees, and terminate on their ceasing to hold the office, and it may also be stipulated that their liability, in any case, shall extend only to the amount of the building fund, and no further. (*k*)

Directors, making a contract without authority on behalf of a company, may, of course, render themselves personally liable upon an implied warranty. (*l*)

(4) CONTRACTS WITH AN URBAN AUTHORITY.

(*a*) *Statutory Provisions as to.*—A contract with an urban authority, whereof the value or amount exceeds £50, must be in writing and sealed with the common seal of such authority, (*m*) and should in all other respects conform to the requirements of sect. 174 of the Public Health Act, 1875. (*n*)

The provision as to a seal has been held to be not merely directory but imperative. (*o*) So that, notwithstanding the other party may have executed the contract, he cannot recover against the urban authority if the contract was not under seal.

(*b*) *Characteristics of Contracts with Urban Authorities.*—Brett, L.J., in *Hunt v. Wimbledon Local Board*, (*p*) clearly points out the important difference between a contract when made with an urban authority and when made with other corporations: "It is not like the case of a corporation where directors may give an order and make an apparent contract, and those on whose behalf they give the order may either reject or accept it; as, for instance, if the directors of a railway company verbally order a railway to be constructed by a certain contractor, the whole corporation (namely, the shareholders, on whose behalf the directors have given the order) may, if they should please, reject the order; but if the railway is constructed, they may accept it by obtaining the benefit of what the contractor has done, and receiving dividends in respect of the use of the railway. Where there is a body of shareholders capable of accepting the benefit of the contract, such a doctrine as

(*k*) *Williams v. Hathaway*, 6 Ch. D. 544. See *Eaton v. Basker*, 7 Q. B. D. 529.

(*l*) *Weeks v. Propert*, L. R. 8 C. P. 427; *Firbank v. Humphreys*, 18 Q. B. D. 54; *Elkington v. Hurter*, [1892] 2 Ch. 452.

(*m*) See Public Health Act, 1875, s. 174 (1).

(*n*) *Ib.*, sub-s. 2. As to what amounts to a good contract under seal, see *Brooks v. Torquay, etc.*, U. D. C. (1901), 1 K. B. 601.

(*o*) *Young v. Leamington*, 8 A. C. 517.

(*p*) 4 C. P. D. 48.

is suggested may be applicable. (q) But here the board is the corporation, who are acting for the inhabitants, who can neither accept nor reject what the board has done. The inhabitants cannot make use of what the board orders in the same way or in the same manner as the shareholders of a railway make use of a railway. . . . It seems to me, therefore, that in the case of such a corporation as this the doctrine suggested would not be applicable at all." (r).

(c) *Agreement to compromise Litigation*.—Where, however, a local board have embarked in litigation, either as plaintiffs or defendants, and in the course of that litigation they make an agreement with a view to a compromise, the agreement so made is not one which comes within the Public Health Act, 1875, s. 174 (1), and need not be under seal. (s) And this principle applies, whether the agreement for compromise is made before or after the actual commencement of litigation. (t) "The test of the thing is, is it done in a *bona fide* attempt to compromise a legal claim, or is it done entirely outside?" (u)

(d) *Penalties in Contracts with Urban Authorities*.—The question whether the provisions of sub-sect. 2 as to a penalty are obligatory or directory only is by no means free from doubt. (w) In a case which was heard by the Divisional Court in 1895, it was held that a contract which did not specify any pecuniary penalty could not be enforced against an urban authority. In giving judgment Pollock, B., apparently relied upon the case of *Young v. Leamington*. (x) The authority of the *British Insulated* case must be regarded as greatly shaken by a recent case (y) in the Court of Appeal, in the course of which, however, no previous authorities were referred to. In that case *Romer and Stirling, L.JJ.* (Vaughan Williams, L.J.,

(q) See *Riche v. Ashbury Carriage Co.*, L. R. 7 H. L. 653; *Smith v. Hull Glass Co.*, 11 C. B. 897; *Renter v. Electric Telegraph Co.*, 6 E. & B. 341; *Spackman v. Evans*, L. R. 3 H. L. 171; *Evans v. Smallcombe*, *ib.*, 249; *Houldsworth v. Evans*, *ib.*, 263; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *London Financial Association v. Kelk*, 26 Ch. D. 107.

(r) *Hant v. Wimbledon L. B.*, was approved of in *Young v. Mayor of Royal Leamington Spa*, 8 App. Cas. 517, and followed in *Start v. West Mersea School Board*, 15 T. L. R. 412. See the cases there cited; and see also *Hoare v. Lewisham Borough Council*, 85 L. T. 281.

(s) *Att.-Gen. v. Gaskill*, L. R. 22 Ch. D. 537.

(t) *Williams v. Barmouth U. D. C.*, 77 L. T. 383.

(u) *Ib.*, per Collins, J., at p. 386 in the L. T.

(w) *British Insulated Wire Co. v. Prescott U. D. C.* (1895), 2 Q. B. 463.

(x) *Supra*.

(y) *Soothill Upper U. D. C. v. Wakefield R. D. C.*, 21 T. L. R. 766.

not agreeing), held that the latter part of the sub-section as to a penalty clause was directory only and not imperative, and that the omission of a penalty clause did not render the contract invalid. (z)

(z) The binding effect of this decision may, however, be questioned hereafter, inasmuch as it was not necessary for the decision of the appeal; see *per* Romer, L.J., at p. 769, col. 1, of the T. L. R.

CHAPTER VI.

AGREEMENTS FOR BUILDING LEASES AND DESCRIPTION OF BUILDING LAND BY PLANS.

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SECT. I.—AGREEMENTS FOR BUILDING LEASES.

(1) FORM AND REQUIREMENTS OF AGREEMENT FOR BUILDING LEASE.

As a general rule, when land is to be let for building, the commencement of the term to be granted is postponed until completion of the houses, and, therefore, an agreement is generally necessary in the first place, and this will particularly be the case where the agreement is for erecting several houses, and the landlord is to have the option of deferring the grant of the several leases until a particular day. (*a*)

A contract to build need not be in writing, but a contract for a building lease is a contract for an interest in land within the meaning of sect. 4 of the Statute of Frauds, which must be in writing, or of which there must be a memorandum or note in

Necessity for.

Must be in
writing. (*b*)

a See forms, *post*, p. 405.

b But see p. 59, *post*, for the rights of a tenant where an oral contract can be proved and there is part performance.

writing, signed by the party to be charged therewith, or some other person by him lawfully authorised. (c) But an agreement after lease granted that the landlord shall enlarge the premises, and the tenant pay a certain percentage on the landlord's outlay, is not within the statute. (d)

An executory agreement for a lease does not satisfy the Statute of Frauds unless it indicate, expressly or impliedly, the day upon which the term is to begin, and there is no inference that the term is to commence from the date of the agreement, in the absence of language pointing to that conclusion. (e) It seems that the words "immediate possession is required" in an agreement for a lease do not point to the commencement of the term. (f)

Necessary to provide that separate leases shall be granted.

It is usual in agreements for granting building leases to provide that the landlord shall grant a separate lease of each house or pair of houses. (g) This is done in consequence of the danger to which otherwise each assignee or sub-lessee of part of the demised premises would be exposed of being distrained upon or evicted by the superior landlord for non-payment of rent or breach of covenant by persons over whom he has no control. (h)

Where a lessee assigns part of the land comprised in his lease and sub-lets the remaining part at apportioned rents, the sub-lessee, if he be compelled to pay the whole of the rent, has no right of contribution against the assignee for his portion thereof, as the assignee and sub-lessee are not subject to a common demand. (i)

Power of entry to builder only for purpose of building.

The agreement in some cases simply provides that, when the houses are completed, the lessor will grant the lease or leases, but that the lessor may enter and take possession of all the buildings and building materials (k) if the lessee fail to complete the houses within the time limited. It is advisable to give the builder, in the first place, a power of entry only for the purpose of building; (l)

(c) As to what the agreement, or the memorandum or note thereof must state, and how the agreement must be signed, etc., see *Woodfall's L. & T.* (1902), p. 100, *et seq.* And see *Williams v. Brisco*, L. R. 22 Ch. D. 441.

(d) *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read* 3 B. & Ad. 899; *Lambert v. Norris*, 2 M. & W. 333.

(e) *Marshall v. Berridge*, 19 Ch. D. 233; *Wyse v. Russell*, 11 L. R. (Ir.) 173.

(f) *Rock Portland Cement Co. v. Wilson*, 52 L. J. Ch. 214.

(g) *Lowther v. Heaver*, 41 Ch. D. 225; and see *infra*, p. 54.

(h) See *post*, Chap. XVIII.

(i) *Johnson v. Wild*, 44 Ch. D. 146.

(k) And retain the materials as his own absolute property; or, in some cases, the landlord is only empowered to use the materials and plant of the tenant by paying for them. See as to stipulations with respect to materials, *post*, Chap. XIII.

(l) See *Goodtitle d. Estwick v. Way*, 1 T. R. 735, and *post*, p. 55. See *Laird v. Briggs*, 19 Ch. D. 22, as to the right of a person in possession under a power of entry for building to maintain an action.

and, after providing for determining the agreement as to any particular parcel of ground if the builder fail to complete the house or houses, to provide that the agreement is intended, until the leases shall be executed, to create a tenancy at will upon the terms mentioned, but to entitle the landlord to the like power and remedy, by distress or otherwise, as if the lease or leases had been actually granted. (*m*)

Sometimes a building agreement contains a clause which gives the builder an option to purchase the freehold at a given price within a time stated. (*n*) Where a building agreement contains such a clause, not conditioned on the due performance of the contract, the builder, although in default, may exercise the option, and as a consequence of so doing escape the consequences of such default. (*o*)

In describing the land which is included in the agreement, it is advisable to refer to the adjoining land as "intended to be built upon, up to the land hereby leased," so that there may be no ground for any doubt upon that matter.

Where, upon the sale of a building plot, it is desired that the lessees of adjoining plots should have the right of building into or upon the said walls, upon certain terms, so that such walls may become party walls, proper stipulations to this effect should be inserted in the agreement for the building lease. (*p*)

In framing agreements for building leases, it is best to set out in *extenso* the several provisions which the lease itself is to contain; but the provisions are sometimes referred to in concise terms (as the lessee to covenant to pay rents and taxes, to repair, to insure, etc.), and are left for expansion at a future day, a somewhat dangerous course of proceeding. It is scarcely necessary to say that an agreement stipulating for the insertion of *all usual covenants*, or *all proper covenants*, or the like, should be carefully avoided. (*q*) In cases where the building estate is extensive, it is best to insert a form of lease in the schedule to the agreement. (*r*)

(*m*) See *Adams v. Hagger*, 4 Q. B. D. 480, and *post*, p. 57. But see now *Walsh v. Lonsdale*, 21 Ch. D. 9; *infra*, p. 54. See form, p. 409.

(*n*) See a form of such a clause, p. 422, *post*. A form will also be found in the report of *Raffety v. Schofield*, *infra*, at p. 948 in the L. R.

(*o*) *Raffety v. Schofield* (1897), 1 Ch. 937. The option must not infringe the rule against perpetuities, *Woodall v. Chilton* (1905), 2 Ch. 257.

(*p*) See *Waddington v. Naylor*, 60 L. T. 480. See *post*, p. 418, for a special stipulation as to party walls.

(*q*) As to what are "usual" covenants, see pp. 55, 230.

(*r*) See forms, p. 429. As to stamps on agreements for, and on building leases, see the Stamp Act, 1891.

Option to purchase.

Description of land.

Walls.

How covenants to be inserted in building lease should be included in the agreement.

(2) INSERTION OF COVENANTS IN AN AGREEMENT FOR A SUB-LEASE.

In *Haywood v. Silber* (s) an agreement for a sub-lease was entered into, the under-lease to contain all usual covenants (including a covenant not to assign or under-let without the consent of the sub-lessor), together with such other covenants, clauses, and provisos as were contained in the lease under which the premises were held. The original lease contained (1) a covenant that disputes relating to the demised premises between the lessee and other tenants of the lessor should be referred to the arbitration of the lessor; (2) that the lessee, his executors, administrators, or assigns would not assign or sub-let without the licence of the lessor; (3) that demises and assignments should be prepared by the solicitors of the lessor. It was held that the covenants in the original lease were not to be taken as models and inserted into the under-lease with the names of the under-lessor and under-lessee substituted for the names of the original lessors and lessees respectively, but that they must be inserted without modification, so as to bind the under-lessee to refer disputes with other tenants of the original lessor to the arbitration of the *original* lessor, not to assign or under-let without the consent of the *original* lessor, and to have his demises and assignments prepared by the solicitors of the *original* lessor, a decision to be carefully guarded against when such is not the intention of the parties.

(3) POSSESSION UNDER AGREEMENT FOR A LEASE.

It is now decided (t) that since the Judicature Acts, where there is an agreement for a lease under which possession has been given, the possession is held under the agreement. The tenant holds under the same terms in equity as if a lease had been granted, it being a case in which relief is capable of being given by specific performance. The landlord can exercise the same rights as he would have had if a lease had been granted. (tt) On the other hand, the tenant is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. (u)

(s) 30 Ch. D. 404. See, however, *Williamson v. Williamson*, L. R. 9 Ch. 729, where it was held that the original lease was to be a model only. A form of sub-lease will be found at p. 443, *post*.

(t) *Walsh v. Lonsdale*, 21 Ch. D. 9; cf. *Adams v. Hagger*, 4 Q. B. D. 480, and *infra*, p. 75. For an example of a clause which gives possession, see *post*, p. 409.

(tt) But see *Lewis v. Baker* (1905), 1 Ch. 46.

(u) *Lowther v. Heaver*, 41 Ch. D. 248; see *post*, p. 57.

The rule in *Walsh v. Lonsdale*, however, has been held not to apply to a case in which the action is brought in a County Court upon a contract for a lease of which the County Court could not decree specific performance on the ground that the premises agreed to be demised exceeded £500 in value. (w)

During the time a lessee is in possession under an agreement for a lease the Statute of Limitations does not begin to run against the owners of the land, inasmuch as they have not an effective right of entry or action for the recovery of the land. (x)

The Statute of Limitations.

Covenants not to carry on a particular trade, or in restraint of trade in a trading locality, are not "usual covenants;" (y) whether they are so or not, however, is a question of fact. (z) Under a contract for a lease to contain usual covenants, where the lessee was to build, and not to use the premises for any other purpose than a glass manufactory, it was held, that the lessor was not entitled to the insertion of an affirmative covenant compelling the lessee to carry on this business. (a)

Covenants against trade not usual covenants.

Where premises are described as "leasehold business premises" the purchaser is entitled to have an assignment of property on which he can carry on any business, subject only to restrictions imposed by the general law, or in force as to any particular trade. (b)

"Leasehold business premises."

Although there are words of present demise in an agreement for a lease, if the document provides that it shall not operate as a lease, but only as an agreement, it will be construed as such. (c) And words of present contract, with an agreement that the lessee should take possession immediately for building or otherwise, and that a lease should be executed in future, operate only as an agreement for a lease, and not as a lease itself. (d) Again, a

Words of present demise.

^u *Foster v. Reeves* (1892), 2 Q. B. 255. Unfortunately the attention of the Court was not directed to s. 89 of the Judicature Act, 1873. Had regard been had to that section, it is submitted that the decision must have been the other way.

^x *Warren v. Murray*, [1894] 2 Q. B. 648.

^y *Wilbraham v. Livesey*, 18 Beav. 206; *Proper v. Parker*, 3 Myl. & K. 280; *Van v. Corpe*, 3 Myl. & K. 269; *Re Anderton and Milner*, 45 Ch. D. 476. See, too, *Hampshire v. Wickens*, 7 C. D. 555; *Re Lander and Bagley*, [1892] 3 Ch. 41.

^z *Bennett v. Womack*, 3 C. & P. 96.

^a *Doe d. Marquis of Bute v. Guest*, 15 M. & W. 160.

^b *In re Davis and Cavey*, 40 Ch. D. 601.

^c *Perring v. Brook*, 1 Moo. & R. 510; *Taylor v. Caldwell*, 3 B. & S. 826. Compare *Doe d. Jackson v. Ashburner*, 5 T. R. 163.

^d *Goodtitle d. Estwick v. Way*, 1 T. R. 735. See *Adams v. Hagger*, 4 Q. B. D. 480, *post*, p. 57, as to rent payable. See *Camden (Marquis) v.*

contract that B. should receive certain sums of money from A., and should build on A.'s land, and procure responsible tenants at a given rate, and himself pay the rent from a certain day till he procured such tenants, creates no tenancy between A. and B. (*e*)

(4) AGREEMENT FOR A LEASE WHERE TENANT OR LANDLORD IS TO BUILD.

Where, after words of present demise, there was an agreement to grant a lease when certain buildings had been finished by the tenant, it was considered that, as the tenant had to lay out money on the premises, he took an immediate legal interest, with an agreement for a subsequent more formal assurance. (*f*) And an agreement for a lease, with stipulations for the lessee to commence laying out a considerable sum on the premises (the lease to contain certain specified covenants), "and in the meantime, until such lease shall be executed, to pay rent, and to hold the same premises subject to the covenants above mentioned," amounts to an actual demise. (*g*)

Where Landlord is to Build.—But, on the other hand, where it is the landlord who agrees to complete certain erections on the premises, that, it seems, is an argument against an actual demise. (*h*)

(5) CONDITIONS PRECEDENT TO GRANT OF BUILDING LEASE.

Approval of
plans by
landlord's
architect.

It is frequently made a condition precedent to the granting of the lease that the buildings shall be duly covered in to the satisfaction of the landlord's architect, in conformity with plans to be approved by him. The law with respect to the breach of similar conditions, where the approval of the architect is made a condition precedent to payment or any other matter, will be considered in a future chapter. (*i*) It would probably be a

Batterbury, 7 C. B. N. S. 864, *post*, p. 57. See *ante*, p. 52, as to power of entry only for building.

(*e*) *Taylor v. Jackson*, 2 C. & K. 22.

(*f*) *Poole v. Bentley*, 12 East, 168. But see *Walsh v. Lonsdale*, *supra*, p. 54.

(*g*) *Pinero v. Judson*, 6 Bing. 206; *Rollason v. Leon*, 7 H. & N. 73; *Wilson v. Chisholm*, 4 C. & P. 474. Compare *Bicknell v. Hood*, 5 M. & W. 104; *Curling v. Mills*, 7 Scott, N. R. 709; *Anderson v. Midland Ry. Co.*, 30 L. J. Q. B. 94; *Holland v. Kensington Vestry*, L. R. 2 C. P. 565.

(*h*) *Doe d. Jackson v. Ashburner*, 5 T. R. 163; *Regnart v. Porter*, 7 Bing. 451; *Gore v. Lloyd*, 12 M. & W. 463; *Doe d. Wood v. Clarke*, 7 Q. B. 211. See *Whittick v. Mozley*, 1 Cababe & Ellis, 86.

(*i*) See *post*, Chap. VIII., p. 94, *et seq.* See *post*, Chap. XIX., and p. 225, *post*, as to covenants to complete buildings to the satisfaction of the surveyor. See forms, pp. 405, 412.

sufficient reply to a landlord, relying upon the default by a lessee in complying with such a condition, that such default was caused by the failure of the landlord and his architect to approve the plans when submitted, or to supply plans if so agreed. (*k*) But if there is a condition, which is clearly expressed, making the architect the sole and exclusive judge in all disputes which may arise in consequence of breaches of the conditions in the agreement, the lessee will be bound by his determination. (*l*)

An agreement by a builder with a lessee to erect a building of such a class, etc., as shall be approved by the freeholder does not, in strictness, make the approval by the freeholder a condition precedent; but it is a definition of what is agreed to be erected, and, if the freeholder do not approve, there is nothing which can be performed, and nothing of which the lessee can insist upon the performance. In the absence of such approval the builder is not liable for breach of contract, if he do not build; the true construction of such an agreement is not to put up such a building as the freeholder shall approve, but such as he shall have approved—that is to say, when approved it shall be put up. (*m*)

The remedy of the landlord for breaches of conditions by the lessee as to time of completion is dealt with in Chap. XI., *post*, pp. 136, *et seq.*

(6) NATURE OF PAYMENTS BEFORE LEASE IS GRANTED.

When, as is frequently the case, it is stipulated that sums in the nature of rent shall from time to time be paid before the lease is granted, such payments have been considered sums in gross, *quasi* rent, but not rent. (*n*) Consequently, assignees of the builder do not acquire any estate in the premises, nor if they pay the *quasi* rent do they assume the position of yearly tenants; the person liable to pay the *quasi* rent is the original contractor. (*o*) The same principle was acted on in *Adams v. Hagger*, (*p*) where, although the builder never took possession

(*k*) *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310. See *post*, Chap. VII.

(*l*) *Roberts v. Bury Improvement Commissioners*, *supra*; *Jones v. St. John's College, Oxford*, L. R. 6 Q. B. 115; and the other cases which are considered, *post*, p. 100, Chap. VIII.

(*m*) *Northumberland Avenue Hotel Co.*, 56 L. T. 833.

(*n*) *Camden (Marquis) v. Batterbury*, 7 C. B. N. S. 864; *Howlett v. Tarte*, 10 C. B. N. S. 813.

(*o*) *Camden (Marquis) v. Batterbury*, *supra*; *Walsh v. Lonsdale*, 21 Ch. D. 9, *supra*, p. 51. And see cases notes *f* and *g*, p. 56. See forms, p. 409.

p, 4 Q. B. D. 480.

of the land, it was held that there was a contract collateral to the intended lease to pay the amount of the rent, and that non-possession of the land was immaterial.

(7) AGREEMENTS TO BUILD SEVERAL HOUSES.

Generally
divisible.

Right of
mortgagee
under such
agreements.

As will be seen in a later chapter, (q) agreements for building leases are, in general, intended to be divisible and to entitle the builder to have a lease of each house when finished, without the condition precedent of finishing all the other houses. The contract is also made divisible in this manner, so that the builder, as soon as he has built to a certain extent on portions of the land, may, by obtaining separate leases of the houses, take them into the market for the purpose of raising money, if required, to enable him to complete the rest of the contract. (r) And there is no obligation or condition implied in contracts of this description that if the intended lessee shall assign to anybody, that assignee shall enter into a distinct and separate agreement and covenant on his part to perform the whole agreement. (s) In such a case, as soon as the agreed number of houses has been covered in, the builder, or his nominee, is entitled to claim and is bound to accept a lease of such houses, and his rights and liabilities are the same as if the lease had been granted, and he no longer holds such houses on the terms of the building agreement, but on the terms to be inserted in the lease, in accordance with the decision in *Walsh v. Lonsdale*; (t) and a proviso for re-entry contained in the agreement, on the builder discontinuing building operations for a certain number of days, cannot be exercised against the completed buildings, although default is made as to other parts of the land comprised in the agreement, and although a lease has not actually been granted of the completed buildings. (u)

(q) See Chap. XVI., p. 203.

(r) See Chap. X., p. 132, *post*, as to advances to builder.

Meaning of
"covered in." (s) *Wilkinson v. Clements*, L. R. 8 Ch. Ap. 96. In this action one defence was that the houses were not "covered in" in accordance with the contract because water-pipes had not been put up, and evidence was given by several surveyors that water-pipes ought to be put up before a house can be said to be, strictly speaking, "covered in." James, L.J., said: "It is, however, reasonably clear that a water-pipe to a cottage costing £200 must be a matter causing only trivial expenditure, much too trivial, I think, to afford a ground for saying that a builder who had omitted it had not completed his contract for the present purpose." As to a wooden roof being deemed complete though not covered with zinc, as provided by the agreement, see *Lowther v. Heaver*, *supra*.

(t) 21 Ch. D. 9.

(u) *Lowther v. Heaver*, 41 Ch. D. 265; *Strong v. Stringer*. 61 L. T. 470.

From the moment the right to have a lease has accrued as regards any particular plot, that plot is to be treated as if a lease had been granted. (x)

The ground landlord sustains no injury by treating such a contract as separable in this respect; he gets a particular portion of his property covered with houses, finished to a certain extent, and he secures a lessee of those houses, who, having laid out money already to a considerable amount upon them, will, for his own sake, be anxious to complete them, and will be bound to pay him the ground rent; and he still retains exactly the same right as he had under the original agreement as regards the remaining ground.

(8) GRANT OF LEASE TO NOMINEE.

It is common in the case of agreements for building leases to provide that the leases are to be granted to the lessee, or to his nominee or nominees. (y) Where there is an agreement to grant a lease to a nominee only, the appointment of a nominee is a condition precedent, and the lessee cannot maintain an action for specific performance of the agreement if he has not performed the condition. (z)

(9) BUILDING LEASES WHERE THERE IS NO WRITTEN AGREEMENT.

Although a mere *oral* agreement for a building lease cannot be sued upon as such, yet, if the terms of such contract be distinctly proved or admitted, and there are acts of part performance, referable solely to the contract as alleged, and consistent with it, and which are sufficient to take the contract out of the operation of the Statute of Frauds, an action for specific performance can be maintained. (a) This equitable doctrine will particularly apply in the case of agreements for building leases; and if a tenant enter, and, with the privity of the landlord, build in such a manner as cannot be referred to any other title than the alleged agreement, this would be a sufficient part performance of the contract. (b)

(x) *Lowther v. Haaver*, *supra*.

(y) See form, *post*, p. 405.

(z) *Williams v. Brisco*, 22 Ch. D. 441.

(a) See *post*, Chap. XVI., on Specific Performance, and pp. 46 and 199; *Price v. Salusbury*, 32 Beav. 446. Affd. Dom. Proc., 14 L. T. N. S. 110. See *Maddison v. Alderson*, 8 App. Cas. 467; *McManus v. Cooke*, 35 C. D. 681; *Farmers' and Cleveland Dairy Co. v. Enkel*, 1890 W. N. 126.

(b) *Wills v. Strudling*, 3 Ves. 378; *Stockley v. Stockley*, 1 V. & B. 23; *Toole v. Medlicott*, 1 Ball & B. 393; *Sutherland v. Briggs*, 1 Hare, 26; *Mundy v. Joliffe*, 5 Myl. & C. 167; *Surcoux v. Pinniger*, 3 De G. M. & G. 571.

Where by a parol contract the plaintiffs agreed to sell to the defendant a plot of land with a house thereon, which they were to build for her; and during the progress of the building she frequently visited the site, and made suggestions for improvements which the plaintiffs carried out. It was held that the acts done by the plaintiffs in compliance with her suggestions were acts of part performance entitling the plaintiffs to a decree for specific performance. (c)

It is the fraud and injustice which would result from allowing the landlord to refuse to grant a lease after the laying out of money in building under such circumstances, which give rise to the equitable jurisdiction in decreeing specific performance of a parol agreement. (d)

Landlord
allowing
builder to
expend
money in
building in
error.

And it has accordingly been laid down by the House of Lords, (e) that if a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the *knowledge* of the landlord, and without objection by him, lays out money upon the land, this, though not strictly part performance, may raise an equity analogous to that which is raised when one stands by and sees another expend money on his land, believing he has good title; and the Court will compel the landlord to give effect to such promise or expectation. So if a tenant from year to year laid out money in building upon land upon an erroneous supposition, created or encouraged by the landlord, that he should have a lease, a Court of Equity would not allow the landlord to profit by such expenditure. (f) But if the tenant failed to show that he had any absolute right as against the owner beyond that of a tenant from year to year, or that the owner knew he was expending his money in the mistaken belief that he possessed such right, he would not be entitled to any relief.

(c) *Dickinson v. Barrow* (1904), 2 Ch. 339. *See quere*, whether the acts done by plaintiffs, being done upon their own land, were exclusively referable to the contract within the authorities: were they not in their own nature referable rather to the plaintiffs' ownership?

(d) *Frame v. Dawson*, 14 Ves. 386; *Lindsay v. Lynch*, 2 Sch. & Lef. 1. See *Williams v. Evans*, L. R. 19 Eq. 547, where an outlay by a sub lessee was held to be as much a part performance as if it had been the outlay of the tenant himself.

(e) *Ramsden v. Dyson*, L. R. 1 H. L. 129; see *per* Lord Cranworth, L.C., in *Nunn v. Fabian*, 11 Jur. N. S. 868.

(f) *Per* Lord Cranworth, L.C., in *Ramsden v. Dyson*, L. R. 1 H. L. 142. See also *Civil Service Musical Instrument Co. v. Whiteman* (1899), 68 L. J. Ch. 484.

It should be observed that the agreement must be complete as a contract, whether it be proved by one or more writings, or by parol evidence, coupled with sufficient part performance to take it out of the statute. (*g*)

Contract in any circumstances must be complete.

(10) BUILDING ON LAND WITHOUT ANY SPECIAL AGREEMENT.

It will not be irrelevant here to refer to the canons laid down in *Ramsden v. Dyson*, (*h*) with respect to building on land where there is no special agreement:

Canons laid down in *Ramsden v. Dyson*.

1. If a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

2. If the tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error (*semble*), equity will interfere to compel the grant of a lease.

3. If a stranger begins to build on land, supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land.

4. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure on it. (*i*)

A person, therefore, expending money in building by mistake upon the property of another has, it seems, no equity against the owner, who was ignorant of, and did not encourage him in his expenditure; but if it were necessary for the owner to proceed in equity, he would probably only be entitled to its assistance,

g *Ramsden v. Dyson*, L. R. 1 H. L. 129, *supra*; *Jackson v. Oglander*, 2 H. & M. 465; and see *Caton v. Caton*, L. R. 2 H. L. 127 (commented on by Kekewich, J., in *Dickinson v. Barrow*, *supra*, at p. 343 in the L. R.); *Lewers v. Earl Shaftesbury*, L. R. 2 Eq. 270; *Bankart v. Tennant*, L. R. 10 Eq. 141. Cf. *Weller v. Stone*, 33 W. R. 421. See *Gregory v. Mighell*, 18 Ves. 328; *East India Co. v. Vincent*, 2 Atk. 83; *Stiles v. Cowper*, 3 Atk. 692; *Unity Bank v. King*, 25 Beav. 72; *Dann v. Spurrier*, 7 Ves. 231.

h *Supra*; and see *Bankart v. Tennant*, L. R. 10 Eq. 141.

i See also *Rennie v. Young*, 2 De G. & J. 136; *Crompton v. Varna Ry. Co.*, L. R. 7 Ch. Ap. 562.

according to the ordinary rule, by doing equity and making compensation for the expenditure. (*k*)

Where lessor is ignorant of his own rights.

So, where the lessor is ignorant of his own rights, and there is nothing to show that he knew that the plaintiff, who had laid out money upon the land, had been acting in ignorance of his legal rights, an action for a specific performance of the agreement could not be maintained against the lessor. (*l*) Mistake of fact under these circumstances is not the less a ground for relief because the person who has made the mistake had the means of knowledge. (*m*)

Claim for work done although no agreement within Statute of Frauds.

Although the agreement be not in writing, and the plaintiff cannot, therefore, bring an action on it, yet under special circumstances he may be able to recover the amount he has expended on a house of which he expected to obtain a lease, as for work and labour done at the defendant's request. (*n*)

(11) LANDLORD'S TITLE.

By statute.

The Vendor and Purchaser Act, 1874 (*o*) enacts that "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold;" but this is "subject to any stipulation to the contrary in the contract." An agreement to deliver an abstract of the title to the freehold excludes this section. (*p*) A lease comprising a right of way is within the section even as to the right of way. (*q*) And the Conveyancing and Law of Property Act, 1881, (*r*) enacts

(*k*) *Neesom v. Clarkson*, 4 Hare, 97.

(*l*) *Willmott v. Barber*, 15 Ch. D. 96 (applied in *Civil Service Musical Instrument Co. v. Whiteman*, 68 L. J. Ch. 484), where the circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it were considered. See *Gerrard v. O'Reilly*, 3 D. & War. 414, 433; *Macher v. Foundling Hospital*, 1 V. & B. 188. See *Jackson v. Cator*, 5 Ves. 690, as to expenditure by lessee giving an equity, but this case was questioned by Fry, J., in *Willmott v. Barber*, *supra*. See the case cited, however, in *Bankart v. Tennant*, L. R. 10 Eq. 141, 147.

(*m*) *Willmott v. Barber*, *supra*.

(*n*) *Pulbrook v. Lawes*, 1 Q. B. D. 284.

(*o*) 37 & 38 Vict. c. 78, s. 2.

(*p*) *Re Pursell and Deakin* (1893), W. N. 152.

(*q*) *Jones v. Watts*, 43 Ch. D. 574.

(*r*) 44 & 45 Vict. c. 41, s. 13. This section is supplementary to s. 3 (1), which is as follows: "Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion."

A receipt for peppercorn rent is not a receipt within s. 3 (4): *Maddy v.*

that on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion. This section, also, does not apply if a contrary intention is expressed in the contract. Under a contract to sell and assign a term of years derived out of a leasehold interest in land, or to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended assign or lessee has the right to call for the lease under which the intended assignor or lessor holds. (*s*)

If, however, the intended lessee purposes to build, it is imprudent and unusual to take a lease without investigating the lessor's title. (*t*)

SECT. II.—DESCRIPTION OF BUILDING LAND BY PLANS.

(1) DESCRIPTION IN AGREEMENTS FOR BUILDING LEASES, AND IN BUILDING LEASES.

In agreements for leases, and in leases of land which is cut up for building purposes, the parcels are frequently described by reference to a schedule and plan. This is a convenient mode of describing the property, but a plan, though a useful adjunct to a specific description, can seldom, especially when drawn on an inadequate scale, show with strict accuracy the precise position of the property; and a slight error in the drawing of the plan may lead to complications of a serious nature. In using plans, therefore, for this purpose, there should be an independent substantive description of the situation, extent, and dimensions of the property intended to be leased, so as to let the plan be merely in aid and explanation of this description. An instance of the probable consequences of relying upon the description of the property by reference to a plan which turns out to be incorrect will be found in the following case. A deed conveyed a piece of land, and the schedule described the land thus :

Yates, 30 Ch. D. 241. A purchaser is entitled to surveyor's certificate, as evidence of performance of covenant to build, *ib.* But cf. *Re Johnson and Tustin*, 28 Ch. D. 84. See *Re Stamford, etc.*, *Contract* (1900), 1 Ch. 237.

(*s*) *Gosling v. Woolf*, [1893] 1 Q. B. 39. But see this case commented on in *Hood v. Challis* (6th ed.), p. 15.

(*t*) See *post*, p. 258, *et seq.*, as to the lessee being put upon inquiry with respect to restrictive covenants of lessor as to building; and precautions necessary where the lessee is to build.

Number on the Plan of the B. F. Estate.	Description of Premises.	—	—
153 b	A small piece marked on the plan	In the occupa- tion of A.	34 perches

The plan was drawn to a scale, but it was found that 153 *b* contained less than 34 perches, according to the actual measurement of the plan, and 27 perches only according to the actual measurement of the land. It was held that the deed passed only the portion of land actually marked off on the plan, as measured by the scale. (*u*) And, again, where a deed purported to convey "all that messuage and several closes of land thereto belonging, called Gotton Farm, in the occupation of G. S., and consisting of the several particulars specified in the first division of a schedule thereunder written, and more particularly delineated in a map or plan thereof drawn in the margin of the schedule," and there were no general words; it was held that evidence that a slip of land had always been occupied with the closes mentioned and delineated in the schedule and plan, and treated as part of Gotton Farm, was not admissible, and that the deed was conclusive. (*w*) But on a conveyance of a plot of land of certain measurements, set out on a plan, with two houses recently erected or about to be erected thereon, it being proved that the foundations were laid before the deed was executed, the Court considered that it was immaterial that the ground occupied by the houses exceeded the measurements stated. (*x*) Where land is conveyed by reference to a plan, and there is an adjoining house of the grantor which in part overhangs the land so conveyed, the overhanging part of the house passes by the conveyance of the land. (*y*)

(2) CONSTRUCTION OF PLAN.

The question of parcel or no parcel is a question of fact for a jury to decide; but it is the province of the judge to explain to

(*u*) *Llewellyn v. Jersey (Earl)*, 11 M. & W. 183. See *Barton v. Daves* (1850), 10 C. B. 261; *Walsh v. Trevanion*, 15 Q. B. 733; *Baker v. Richardson*, 6 W. R. 663; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Summer v. Schofield*, 43 L. T. 763. See also *Davis v. Shepherd*, L. R. 1 Ch. Ap. 410; and *Nene Valley Drainage Commissioners v. Dunkley*, 4 Ch. D. 1.

(*w*) *Barton v. Daves*, 10 C. B. 261, *supra*.

(*x*) *Manning v. Fitzgerald*, 1 F. & F. 633.

(*y*) *Laybourn v. Gridley*, [1892] 2 Ch. 53; as to overhanging cornice, see *Whittaker v. Jackson*, 2 H. & C. 926.

the jury how the plan, as any other portion of the deed, is to be construed. (z)

In *Lyle v. Richards* (a) the boundary in a lease was described as "a line drawn from J. V.'s house" to a bound-stone; and in the description of the parcels in the lease it was said, "which said premises are particularly described by the map on the back." The boundary line on the plan appeared to be drawn from the north-east corner of the house; but the position of the property was inaccurately represented on the plan, and the question in dispute depended upon what part of the house was to be taken as the starting-point for the line. Lords Cranworth and Chelmsford (b) held that the judge below was bound to look to the plan as forming part of the deed, and, notwithstanding the inaccuracy of the plan as to the position of the house, to direct the jury that the line was to be drawn as marked on the plan. Lord Westbury (c) considered that as it had been ascertained that the house itself was incorrectly laid down in the plan, it was impossible to know by an examination of the deeds, or by their construction alone, from what corner of the house the boundary line was to be drawn; and that consequently there was a latent ambiguity, which was to be determined by evidence, and was not dependent on construction. And this seems to be the better opinion; for as long as the plan was not found to be incorrect, it would be interpreted, like every other part of the instrument, by the judge; but when the plan was proved to incorrectly represent the position of the house, it was a question of fact what parcels were intended to be comprised in the lease.

Parcels were described in a conveyance by reference to a plan and colours. A yard, which was delineated in the plan, but not coloured, was held to pass under the word "yards," which was used in the general words. (d)

(3) REFERENCES TO PLANS.

So where land is sold for building by reference to a plan accompanying the particulars, which is incorrect, it will be a material ^{Reference to an incorrect}

(z) See *Lyle v. Richards*, L. R. 1 H. L. 222. As to parol evidence being admissible on the question of "parcel or no parcel," see *Cole, Ejec.* 240; *Blankley v. Smith*, 11 Sim. 150; *Queen v. Thomas*, 3 Myl. & K. 353; *Price v. Griffith*, 1 De G. M. & G. 80.

(a) *Supra*.

(b) *Dissentiente* Lord Westbury.

(c) *Lyle v. Richards*, *supra*, at p. 238 in the L. R.

(d) *Willis v. Watney*, 51 L. J. Ch. 181.

plan on sale
of building
land.

consideration with the Court whether the purchaser was misled by such plan. (e) If accurate, it is merely tantamount to a view of the property. (f) Should the purchaser be misled by the plan which represents adjoining land as forming part of the property, the Court may refuse to enforce the contract. (g) Where lot 1 was described as building ground, and was expressed to be sold subject to the rights of way reserved by the existing leases of adjoining property 2, and the particulars contained plans which disclosed a carriage-way reserved over lot 1 to 2, and also a footway reserved over lot 1 to another lot 3, but gave no indication of another footway reserved over lot 1 to 2, the misdescription was held sufficient to entitle the purchaser to rescind the contract. (h) And where the owner put up the whole of an estate, except a small piece of land, for sale in lots, subject to restrictive covenants as to the class of buildings to be erected thereon, and the different lots were coloured, and the excepted piece of land was uncoloured, but was not marked with the vendor's name, though the names of the adjoining owners were printed, the Court refused to enforce the contract against a purchaser of one of the lots, who had purchased in the belief that the whole of the vendor's estate was included in the particulars of sale, unless the vendor entered into similar restrictive covenants as to the excepted plot. (i)

Where plan
represents
intended
state, etc.,
of adjoining
land.

A plan, if referred to by an instrument, must be read along with it, and be looked to for the purpose of explaining it. (k) But the mere exhibition of a plan does not amount to a representation or warranty that all the ground exhibited in the plan shall be put, or shall continue, in the same state in which it was exhibited upon the plan; (l) and, on the lease or sale of building land, the exhibition on the plan of intended roads or other improvements on the adjacent land, does not bind the lessor or vendor to make or execute such roads or improvements. (m) And, again, the lessee or

(e) *Fewster v. Turner*, 6 Jur. 144; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542.

(f) *Ib.*

(g) *Weston v. Bird*, 2 W. R. 145; *Denny v. Hancock*, L. R. 10 Ch. Ap. 1.

(h) *Dykes v. Blake*, 4 Bing. N. C. 463. See *Att.-Gen. v. Biphosphated Guano Co.*, 11 Ch. D. 327; *Ashburner v. Sewell*, [1891] 3 Ch. 405.

(i) *Buskeomb v. Beckwith*, L. R. 8 Eq. 100; and see *post*, Chap. XXI., S. III. (11).

(k) *Clarke v. M., etc., Ry. Co.*, 1 J. & H. 631; *Nicholson v. Rose*, 4 De G. & J. 10. See *Tulk v. Moxhay*, 2 Phill. 774.

(l) *Tucker v. Fowles*, [1893] 1 Ch. 195. See *post*, Chap. XX. as to restrictive covenants.

(m) *Whitehouse v. Hugh* (1905), 22 T. L. R. 89; *Fcoffees of Heriot's Hospital v. Gibson*, 2 Dow. 301; *Squire v. Campbell*, 1 Myl. & C. 459, 486; *Nurse v. Lord Seymour*, 13 Beav. 269; *Fewster v. Turner*, 6 Jur. 144; *Tulk v.*

purchaser will not be entitled to a grant of a right of way over any roads so laid down on the plan, except such as form the direct means of communication with the nearest highway. (n) Of course where the plan has been made distinctly and expressly a part of the agreement, the case is very different. (o) And it seems that it would not be competent to a vendor to divide the land in a different manner, so as to attract an occupancy and population entirely different from that which would have been produced by acting on the plan proposed and held out at the sale. (p)

If a man buy land with notice acquired from plans or otherwise that it forms part of a building estate, he may be restrained by other landowners on the estate from dealing with the land he has purchased, otherwise than in accordance with the restrictions to which such land is subject as part of such building estate. (q)

For the purpose of identification, it has been held at law to be sufficient that an abstract should refer to, without containing copies of, maps or plans indorsed upon the deeds: (r) but this can scarcely be so in cases where, as sometimes happens, a deed contains no substantive description of the property, but conveys it merely by reference to the plan. (s) A tracing of the plan employed to define, or to elucidate the description of the parcels, when not sent with the abstract, is usually furnished upon the purchaser's request, and may, it seems, in most cases be insisted on. (t)

Reference to plan in abstract.

(4) IDENTITY OF PLAN.

If a building agreement expressly refer to a plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan. (u) But the evidence must be such as to establish the identity of the plans to which the reference is made; and a bill was dismissed for the specific

Parol evidence to identify plan.

Morhay, 2 Phill. 774, *supra*. See *Baskcomb v. Beckwith*, *supra*; *Schreiber v. Creed*, 10 Sim. 9; *Nicholson v. Rose*, 4 De G. & J. 10; *Eastwood v. Lever*, 4 De G. J. & S. 114; but see *Beaumont v. Dukes*, Jac. 422.

(n) *Randall v. Hall*, 4 De G. & S. 313. See also *post*, p. 267, under "Rights," etc.

(o) *Rankin v. Huskisson*, 4 Sim. 15; *Slee v. Corporation of Bradford*, 4 Giff. 262.

(p) *Peacock v. Penon*, 11 Beav. 355.

(q) *Tindall v. Castle*, 62 L. J. Ch. 555; and see *post*, Chap. XX.

(r) See *Blackburn v. Smith*, 2 Exch. 792, *sed quare*.

(s) See *ante*, p. 64, as to the danger of describing property by reference only to a plan.

(t) *Dart, V. & P.*

(u) *Hodges v. Horsfall*, 1 R. & My. 116. See *Chinn v. Cooke*, 1 Sch. & Lef. 32, and *Murley v. McDermott*, 3 N. & P. 356.

performance of an agreement to grant a lease of "all those premises at, etc., as per plan, etc.," because the evidence failed to show which of several plans was the one intended. (*w*)

Precautions
necessary.

In order to avoid questions of this nature, the plan should be signed by the parties, and annexed to the contract; or, what would be still better, should be indorsed, where possible, on the contract.

In a Canadian case, where a contract provided that works should be constructed along *Notre Dame St.* from *Berry St.* to *Lacroix St.*, "as shown on a plan" annexed, these words were held to mean as far as the plan shows along *Notre Dame St.*, but not exceeding the most distant side of *Lacroix St.* (*x*)

(*w*) *Hodges v. Horsfall*, 1 R. & My. 116, *supra*.

(*x*) *City of Montreal v. Canadian Pacific Ry. Co.* (1903), 33 Can. S. C. Rep. 396.

CHAPTER VII.

THE ARCHITECT, HIS POWERS, DUTIES, AND LIABILITIES.

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SECT. I.—PRELIMINARY.

SEVERAL of the statements in this and the following chapters are to a great extent as much applicable to an agreement for a building lease as to a building contract. Further, it may be stated that, generally speaking, the position of an architect under a building contract is substantially the same as that of an engineer under an engineering contract; and the cases which have been decided in relation to architects and engineers respectively, may in general be regarded as interchangeable authorities.

SECT. II.—THE APPOINTMENT OF AN ARCHITECT.

When the building to be erected is of importance an architect is generally retained, being selected either by competition, (a) or by private arrangement. (b)

(a) See conditions for a competition, F. L., *post*, p. 468.

(b) See form of agreement, F. XLIX., *post*, p. 466.

Form of
agreement.

No particular form of appointment is necessary, and the retainer may, with two exceptions, be either verbal, or implied from the acts of the parties, or the circumstances of the case. If the agreement is one which is not to be performed within the space of one year from the making thereof, (c) that is, is incapable of being completely performed within the year, (d) it must be in writing. As to secret agreements between employer and architect or builder and architect, see pp. 85, 87, *post*.

Agreement
with corpora-
tion should be
under seal.

If the architect is retained by a corporation, the agreement should generally be under seal. This is for the reason that a corporation can only contract under seal except in certain cases. Thus, (e) where an urban authority verbally directed their surveyor to employ the plaintiff, an architect, to prepare plans for offices, which was done, and the authority advertised for tenders for building the offices in accordance therewith, but when these were sent in, it was found that the plaintiff's plans were upon too expensive a scale, and the intended offices were not erected; but although the offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed (the case was decided in reference to the Public Health Act, 1875), (f) it was held that the plaintiff could not recover, on the ground that the defendants were a corporation, and that the contract was not under seal. (g)

So a claim for making a plan of one of the parishes of a union was disallowed, on the ground that this was not a contract incident to the purposes for which the guardians were incorporated, and therefore not within the exceptions to the general rule, requiring contracts by a corporation to be under seal. (h)

Distinction
between
urban and

It is important to note that in the case of *Hunt v. Wimbledon Local Board* (i) the Court was really deciding a matter which was

(c) Statute of Frauds, 29 Car. 2, c. 3, s. 4. See *Britain v. Rossiter* (1879), 11 Q. B. D. 123.

(d) *Donellan v. Read*, 3 B. & Ad. 899; *Birch v. Earl of Liverpool*, 9 B. & C. 382; and see *Hoby v. Roebuck*, 7 Taunt. 157; *Smith v. Gold Coast and Ashanti Explorers, Ltd.* (1903), 1 K. B. 285.

(e) *Hunt v. The Wimbledon L. B.* (1878), 3 C. P. D. 208; on appeal, L. R. 4 C. P. D. 48. Approved in *Young & Co. v. Mayor, etc., of Royal Leamington Spa* (1883), 8 App. Cas. 517.

(f) 38 & 39 Vict. c. 55.

(g) See cases, *ante*, p. 43, *et seq.*, as to building contracts by corporations.

(h) *Paine v. Guardians of Strand Union*, 8 Q. B. 326. But see *Scott v. Clifton School Board*, 14 Q. B. D. 509, where "necessary officer," in the Elementary Education Act, 1870, was held to include an architect.

(i) *Supra*.

dealt with by Act of Parliament. In the case of a local authority other than an urban authority, while the rule as to all contracts being under seal is still of general application, "if the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, and orders are given at a board regularly constituted and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied and accepted by the corporation and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that, though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal was wanting, and then say, 'No action lies; we are not competent to make a parol contract, and we avail ourselves of our own disability.'" (j)

other local authorities.

Enough has been said, however, to show that an agreement between a local body of any kind and an architect should generally be made under seal; and it may be observed that it was incidentally pointed out in the case above quoted (k) that while sect. 56, sub-sect. 1 of the Local Government Act, 1894, enables certain local authorities to delegate authority to committees, the power of making contracts cannot be so delegated. An architect should therefore take care that he makes his contract with the local authority itself. Letters passing between him and the committee cannot operate as a valid contract between him and the corporation.

Agreement under seal practically essential.

There does not appear to be any English case relating to the right of an employer to dismiss the architect. It was decided, however, in New South Wales that under the terms of an ordinary building contract the employer is not at liberty to discharge one architect and substitute another in his place. (l) In contracts of any magnitude a clause is usually inserted to provide for the appointment of a new architect or engineer as the case may be. (m)

Dismissal of architect.

Where the work is to be performed under the direction of an

Appointment may be con-

(j) *Lawford v. Billericay R. D. C.* (1903), 1 K. B. 772, per Vaughan Williams, L.J., at p. 781. See also *Start v. West Mersea School Board* (1899), 63 J. P. 440. Cf. *Waghorn v. Wimbledon L. B.*, *Times*, June 4, 1877.

(k) *Lawford v. Billericay R. D. C.*, *ib.*, at p. 780.

(l) *Murray v. Cohen* (1848), 9 N. S. W. Rep. 124.

(m) See Cl. 3, F. VIII., *post*, p. 383.

dition precedent to builder's liability.

architect to be appointed by the employer, the appointment of such architect is a condition precedent to the liability of the builder to commence his work; and, if the architect is not appointed within a reasonable time, the builder may be released from his engagement to do the work. (*n*)

SECT. III.—REMUNERATION OF ARCHITECT.

The mere employment of a professional person implies an undertaking to give him a reasonable remuneration, but this inference may be rebutted by circumstances. (*o*)

Scale of the Royal Institute.

There is no fixed rule regulating the payment of architects, but a Schedule of Rules and Charges is published by the authority of the Royal Institute of British Architects. (*p*) These rules, of course, cannot be binding on the parties to a building agreement, unless they specially agree that the charges of the architect shall be in accordance with those authorised in the schedule.

In an unreported case (*q*) an architect was employed to prepare plans for a house. The lowest tender obtained being too high, the builder abandoned his intention of building. The architect brought an action to recover £169, being 3 per cent. on the lowest tender. It was alleged that he was entitled to this sum, having regard to the rules. (*r*) Two architects who were called on the part of the defendant, said that the rule in question was not universally adopted, and that the sum of £75 tendered by the defendant was a reasonable fee for the services rendered. Kennedy, J., held that the rule above mentioned was generally adopted. He awarded the plaintiff £125, being 2½ per cent. on a £5000 estimate and costs.

Notwithstanding this decision, it is most advisable that the remuneration of the architect should be defined by a written agreement (*s*) between him and the employer.

(*n*) *Coombe v. Greene*, 2 D. N. S. 1023. See *post*, Chap. XIX., at p. 225, and cases there cited.

(*o*) *Manson v. Baillie*, 2 Macq. H. L. Ca. 80; and see *Taylor v. Brewer*, 1 M. & S. 290; cf. *Bryant v. Flight*, 5 M. & W. 111; *Bird v. M'Gahey*, 2 C. & K. 707.

(*p*) These were revised by the Royal Institute in 1898. See *post*, p. 470. As to Ryde's scale, see *Stenning v. Mitchell & Co.*, Appendix, p. 661.

(*q*) *Whipham v. Everitt* (1900), *Times*, March 22; *Roscoe's Digest of Building Cases*, p. 171.

(*r*) See Rule 5, *post*, p. 470.

(*s*) For the meaning, in an agreement for the remuneration of an architect, of the expression "the total cost of the works," see *Bank of New Zealand v. Simpson* (1900), A. C. 182. Unassisted by the context, it is an ambiguous expression, and should never be used without definition.

The remuneration of the architect, if regulated by contract, may be made contingent on the happening of a certain event, and he will not be entitled to make any charge unless such event actually happens; *(t)* or it may be subject to the plans, etc., being previously approved of by the employer, *(u)* in which case no right to payment will arise until such approval has been obtained.

Remuneration contingent.

Subject to approval of plans by employer.

Where the architect's work proves to be useless, and his employer derives no benefit therefrom, the architect may cease to be entitled to recover his fees, *(w)* and where there has been a total failure of consideration, fees already paid may apparently be recovered back. *(x)*

Loss of remuneration.

If the building owner, having employed an architect to prepare plans, etc., for a building, and to supervise the building operations, abandons his project, it is probable that where there has been no express agreement to pay the architect anything, he can sue as on a *quantum meruit*. *(y)*

Where building abandoned.

Where an architect was employed to prepare plans, etc., for certain buildings at a fixed sum, and the owner, finding that the buildings would cost more than he was prepared to spend, did not proceed with the works, the architect brought an action to recover his fees. Although Coleridge, C.J., told the jury that if, in all the circumstances, they thought the owner was entitled to reject the plans, they should find for the defendants, the jury awarded the plaintiff £200. *(z)*

SECT. IV.—BANKRUPTCY OR DEATH OF ARCHITECT. *(zz)*

All moneys due and payable to an architect for work done in the course of his profession, before bankruptcy, pass to the trustee upon his bankruptcy, and professional earnings after bankruptcy and before discharge also pass to the trustee, subject to the deduction of a sufficient sum for the necessary support of the bankrupt and his family. *(a)*

Where architect becomes bankrupt.

(t) *Moffatt v. Lawrie*, 15 C. B. 583; see this case, *post*, p. 75, under preliminary plans. See also *Richardson v. Beale* (1867), *Times*, June 29.

(u) *Moffatt v. Dickson*, 13 C. B. 543; see this case, *post*, p. 74, under preliminary plans.

(w) See further, as to this, at p. 82, *post*.

(x) *Columbus Co., Ltd. v. Cloues* (1903), 1 K. B. 244, cited at p. 83, *post*.

(y) See *Spratt v. Dornford*, *Times*, December 1, 1862.

(z) *Hurr v. Ridout* (1893), *Times*, February 22; *Builder*, February 25, 1893, p. 157.

(zz) As to architect's successor, see p. 383 *n.*, *post*.

(a) *Emden v. Carter*, L. R. 17 Ch. D. 768. But see *Ex parte Benwell, Re Hutton*, 14 Q. B. D. 301, as to future earnings. See *per* Parke, B., in *Gibson v.*

An architect, who is an undischarged bankrupt, may maintain an action for work and labour done by him after his bankruptcy, if the trustee does not intervene. (*b*)

Death of
architect.

Contracts, which have for their object some performance or matter which is strictly personal to the parties, are, in general, construed as made upon the implied condition that the contracting parties shall live long enough and continue practically capable to perform the contract. The contract, therefore, of an architect is discharged by his death, or by incapacity from illness, and does not survive to or against his representative. (*c*) So, if there was a special contract to do particular work for a *certain sum*, the representative of the deceased architect could not, if the work was not entirely performed, recover any payment. But the death of the architect does not discharge a vested right of action accrued under a contract; for instance, instalments already earned under a contract providing for payment by instalments. (*d*) It is well to insert in an agreement with an architect some clause making provision for what shall be paid on his death. (*e*)

Instalments
accrued be-
fore death.

SECT. V.—RIGHTS OF ARCHITECT IN RESPECT OF PLANS AND PRELIMINARY DRAWINGS.

Preliminary
plans.

Preliminary plans are either made subject to a special contract for that purpose, or, usually, in the case of public competitions, to the terms of the advertisement; the latter mode will, therefore, require no further consideration, beyond stating that where plans are sent in for competition, the employer cannot make use of them if the competition is not proceeded with. (*f*)

Plans to be
approved of

If an architect agree to prepare probationary plans and drawings (which Jervis, C.J., considered to mean "drawings to be approved of by all the requisite parties"), and he fail to obtain such approval, he will have no cause of action; (*g*) and, if no time is fixed within which the plans are to be finished, the presumption

Carruthers, 8 M. & W. 321, 333. And see *Beckham v. Drake*, 2 H. L. C. 579; *Williams v. Chambers*, 10 Q. B. 337; *Whitmore v. Gilmore*, 12 M. & W. 808; and *Ex parte Benwell*, *supra*, as to contracts requiring the bankrupt's personal skill and labour.

(*b*) *Jameson & Co. v. Brick & Stone Co.*, 4 Q. B. D., 208.

(*c*) *Hall v. Wright*, E. B. & E. 765; *Taylor v. Caldwell*, 3 B. & S. 835. *Per Parke, B.*, in *Wills v. Murray*, 4 Exch. 866.

(*d*) *Stubbs v. Holywell Ry. Co.*, L. R. 2 Ex. 311.

(*e*) For a precedent of such a clause, see F. XLIX., Cl. 15, p. 467, *post*.

(*f*) *Landless v. Wilson*, 8 Ct. of Sess. Cas. 289.

(*g*) *Moffatt v. Dickson*, 22 L. J. C. P. 265.

will be that a reasonable time was intended, and the question whether a reasonable time has elapsed will be for the jury. (*h*)

The contract in the above case of *Moffatt v. Dickson* is not unlike one in an action in which the same person was plaintiff; (*i*) there the architect was to make all requisite plans for laying out certain land for building purposes, on condition that he should make no charge for such services, but that if the land was disposed of for building purposes, he should be appointed architect; the land was not so disposed of, and it was held the architect could not recover for the plans. This case makes it clear that, where an architect enters into an agreement to give his services without making any charge, except upon certain events happening, when he is to be appointed architect, or is to receive remuneration, although he may have given his services, he will not be entitled to make a charge if the excepted events have not happened.

Plans subject to a contingency.

In an action by an architect whose plans, after having been accepted, are rejected on the ground that the work cannot be done for the amount of his estimate, it seems that it is a question for the jury whether it is an express or implied condition of the contract that the estimates shall be reasonably near the actual cost. (*k*)

Acceptance of plans subject to estimate being near actual cost.

All agreements should, therefore, clearly set out the terms upon which probationary drawings, etc., are to be provided; and, if it is intended that the architect should make a charge for such preliminary work under the circumstances, or, in any event, for work actually done, a special clause should be inserted to that effect. (*l*) In the absence of an agreement, the usual fee paid to the architect for work, which is subsequently abandoned, is $2\frac{1}{2}$ per cent. on the estimated cost. (*m*) But it has been decided that an architect is not entitled to recover commission (claimed on the amount of the lowest tender) on the estimated expense of a building, never in fact erected, as that would include payment for supervision of the works, but he was allowed remuneration for plans, specifications and working drawings, and quantities taken out by him. (*n*)

Special agreement as to probationary drawings advisable.

SECT. VI.—OWNERSHIP OF PLANS.

It is advisable that a special provision should be inserted in the agreement as to the ownership of the plans. It has

(*h*) *Hurton v. Griffiths*, 11 M. & W. 817.

(*i*) *Moffatt v. Lawrie*, 24 L. J. C. P. 56.

(*k*) See *per* Cockburn, C.J., in *Nelson v. Spooner*, 2 F. & F. 613.

(*l*) See form, *post*, p. 466.

(*m*) See Schedule of R. I. B. A., r. 5, *post*. But see *ante*, p. 72.

(*n*) *Farthing v. Tompkins*, 9 T. L. R. 566.

been held that, supposing a custom to exist that the architect, in the event of his employment being put an end to, is entitled to be paid for the plans and retain them, such a custom is not a reasonable one. (o) And even where the employment is not put an end to, but merely runs its course, the law recognises no such custom.

In a recent case (p) an architect was employed by the owner of certain houses to design and carry out the conversion of the houses into flats, and he was to receive 5 per cent. on the contract price for his services. The architect accordingly prepared plans and specifications, and superintended the work of conversion. At the conclusion of the work the owner paid the architect his fees, and claimed to be entitled to the plans and specifications. At the trial the architect tendered evidence of a custom in the profession by which, in the circumstances of the case, the plans and specifications were the property of the architect. It was held that the custom was unreasonable; that the evidence was not admissible; and that the plans and specifications belonged to the building owner.

SECT. VII.—DUTY OF ARCHITECT.

Generally.

The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability. And when architects or surveyors are employed, although the highest possible degree of skill cannot be demanded, yet there is on their part an implied warranty that they are reasonably competent to the task they undertake. (q) The architect is, moreover, responsible not only for himself, but for those whom he may employ under him. (r)

It was at one time held that valuers, recklessly valuing property for a *mortgagor*, were liable for loss sustained by a *mortgagee*,

(o) *Ebdy v. M'Gowan*, *Times*, November 17, 1870.

(p) *Gibbon v. Pease* (1905), 1 K. B. 810, following *Ebdy v. M'Gowan*, *Times*, November 17, 1870. In case of sketches for works abandoned, this custom is recognised by the Office of His Majesty's Works and Public Buildings. See *Gooding v. Euling L. B.*, 1 Cab. & El. 359; *Times*, November 14, 1884, as to the power of an urban authority, acting under the Public Health Act, 1875, to retain plans, although they have disapproved of the erection of the buildings comprised in them.

(q) *Harmer v. Cornelius*, 5 C. B. N. S. 236; *Duncan v. Blundell*, 3 Stark. 6, cited 5 M. & P. 548; Pothier, *Louage*, 404, No. 525. See per Jervis, C.J., in *Jenkins v. Betham*, 15 C. B. 168.

(r) *Lord North's Case*, Dy. 161; *Mackersy v. Rumsays*, 9 C. & F. 818. The principal, in most instances, has no remedy directly against the sub-agent, there being no privity between them; see *Cobb v. Becke*, 6 Q. B. 930; *Robbins v. Fennell*, 11 Q. B. 248.

who acted on such valuation. (s) The same law would, no doubt, have been applied to an architect acting recklessly, but the law is no longer the same. (t)

In *Le Lievre v. Gould*, (u) mortgagees of the interest of a builder under a building agreement advanced money to him, from time to time, on the faith of certificates given by a surveyor, that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor, the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part, and it was consequently decided that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and that they could not maintain an action against him by reason of negligence.

To whom
does he owe
a duty.

In the absence of any contract, an action for negligence cannot be maintained where there is no fraud. (x)

The most satisfactory mode of determining whether the architect has exercised proper skill is, to show by evidence whether a majority or even a moiety, out of a given number of skilful and experienced persons would have acted as he has done. (y) In his "Principles of the Law of Scotland," Mr. Bell thus lays down what he conceives to be the duty of a professional man—

Duty to exer-
cise skill.

Scots law.

1. Where a specific act is ordered to be done, it must be done according to rule: neither neglected or unskilfully done.

2. Where the act to be done may be safely done by following a known method, which is the plain and common rule of the profession, the professional man is responsible if he neglects to follow the method.

3. Where an operation to be performed is complicated and difficult, a professional man may err and be unsuccessful and yet not responsible if he fairly exert the best of his judgment.

Where an engineer (and the same rule would, of course, equally apply in the case of an architect) was employed by a committee for erecting a bridge and forming a road to it, to make an estimate of the expense, it was held that he was bound to ascertain for himself

Duty to make
experiments.

(s) *Cann v. Willson*, 39 Ch. D. 32.

(t) *Le Lievre v. Gould*, [1893] 1 Q. B. 491. See as to the liability of a valuer for negligence in making a valuation, *Love v. Mack* (1905), 92 L. T. 345.

(u) *Supra*.

(x) *Le Lievre v. Gould*, *supra*; *Derry v. Peck*, 14 A. C. 337. See further as to negligence, p. 79, *post*.

(y) *Chapman v. Walton*, 10 Bing. 63.

by experiments, the nature of the soil, although a person previously employed by such committee, having made the experiments, gave him, by their desire, information of the result. (z) "If a surveyor delivers an estimate greatly below the sum at which a work can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover. (a)

Duty to
supervise
building
operations.

The duty of an architect in the matter of supervision has been considered in a recent Scotch case. (b) There the defender was employed on the usual terms to plan and supervise the building of a villa. Part of the work consisted of a cement floor. The bottoming for this floor was composed of improper materials, with the result that dry rot broke out in the woodwork, to the loss and damage of the pursuer, who sought to recover the same from the defender. Held, that the pursuer was entitled to judgment; that upon the facts the architect had failed to exercise reasonable supervision, and was liable in damages to his employer on account of work which he had certified, but which was in fact disconform to contract. Held, further, that an architect does not fulfil his duty of supervision merely by making occasional visits to the building and getting any parts of the work set right which he happens to notice are not in accordance with the contract. His duty is to give such supervision as will reasonably enable him to certify that the work of the contractors is according to contract.

To inspect
work hid
from view.

"There may, of course, be many things which the architect cannot be expected to observe while they are being done—minute matters that nothing but daily or even hourly watching could keep a check upon. . . . But he, or some one representing him, should undoubtedly see to the principal parts of the work before they are hid from view, and if need be, I think he should require a contractor to give notice before an operation is to be done which will prevent his so inspecting an important part of the work as to be able to give his certificate upon knowledge, and not on assumption as to how work hidden from view had been done." (c)

(z) *Money Penny v. Hartland*, 2 C. & P. 378. See *Farnsworth v. Garrard*, 1 Camp. 38; *Grounsell v. Lamb*, 1 M. & W. 352; *Bracey v. Carter*, 12 A. & E. 373, as to defendant reducing damages by showing work was improperly done, or bringing an action for negligence; and see cases, *post*, Chap. IX.

(a) *Per Best, C.J.*, in *Money Penny v. Hartland*, *supra*, at p. 381.

(b) *Jameson v. Simon* (1899), 1 F. 1211.

(c) *Ib.*, *per* the Lord Justice Clerk, at p. 1219. See also as to negligence in supervision, *Armstrong v. Jones*, *Builder*, January 1, 1870.

SECT. VIII.—LIABILITY FOR NEGLIGENCE.

The law of negligence is thus stated in a well-known text-book, (d) "The degree of skill requisite is such as may be expected in the circumstances of time and place from an average person in the profession—one neither specially gifted nor extraordinarily dull. Where this reasonable amount of information and skill proportioned to the duties that are undertaken is found, there is no liability for errors of judgment in the application of knowledge. Each case must depend on its own circumstances; with the paramount consideration that when an injury has been sustained that could not have arisen unless from the absence of reasonable skill or diligence, then there is liability."

It has also been said that "To render a professional man liable for negligence, it is not enough that there has been a less degree of skill than some other professional men might have shown. Extraordinary skill is not required unless professed or contracted for; a fair average degree of skill is all that can be insisted on. Or, as it has been laid down, a person who enters a learned profession undertakes to bring to the exercise of his business nothing more than a reasonable degree of skill and care. He does not undertake, if he is an attorney, that he will gain a cause at all events; or, if he is a physician, that he will effect a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill." (e)

In *Rogers v. James* (f) the plaintiff, an architect, sued to recover fees from his employer. The employer counterclaimed for negligence in over-certifying; the jury found that the plaintiff had been negligent. It was decided that the architect was not protected from liability for negligence by his powers of valuation and certifying under the contract. Negligence in over-certifying.

The following case also throws some light upon what may be the consequences of negligence on the part of an engineer. A ship was to be lengthened and repaired to the satisfaction of the consulting engineer of the employer. Before the vessel Illustrative cases as to negligence.

(d) *Bevan on Negligence*, p. 1366; and see *Cumbs v. Beck*, 56 Am. St. Rep., 196.

(e) *Per Tridell, C.J.*, in *Lafayette v. Philip*, 8 Car. & P. 475. As to damages, see *Columbus Co. v. Chivers* (1903), 1 K. B. 214, *post*, p. 83.

(f) 56, J. P., 277.

was delivered, the engineer and the employers had abundant opportunity of seeing whether the lengthening or repairs were or were not duly carried out. There was no fraud of any sort, and the existence of a defect might easily have been ascertained before and at the time of delivery of the vessel, and the fact that it was not ascertained was owing to the neglect and default of the employer's agents. Defects having become apparent after the ship was delivered over, the owners brought an action to recover damages in respect thereof. It was decided that the utmost which was recoverable from the builders was the amount which it would have cost to have rectified the defect at the time when the vessel was delivered, and before she was sent on any voyage. (*f*)

Negligence in measuring.

In another case (*g*) an architect sued his employers for the balance of his commission. It was alleged in the defence that he had been negligent in taking out the quantities and measuring up the work done. An official referee to whom the matter was referred, found that the error was only three-quarters per cent., and that this could not be regarded as a serious error in a contract which involved a sum of £10,000. Judgment was entered for the plaintiff.

Trespass.

In the Irish case of *Monks v. Dillon* (*h*) works were executed by a contractor for a drainage board under the superintendence of their engineer, who had prepared the plans and often saw the works while in progress. Some of the works amounted to a trespass on the plaintiff's land. The engineer was held liable for the trespass committed.

Who can sue architect for negligence.

A question may sometimes arise as to who is entitled to sue the architect for negligence. He acts as an intermediary between building owner and builder. Which of these two parties may support a claim for damages?

Liability to builder.

It seems that under special circumstances, as where the architect contracts personally with the builder, and supplies him with a bill of quantities for reward paid by the builder to him in that behalf, he may incur liability to the builder. The following case, (*i*) which is referred to in the above text-book, appears to illustrate this.

Inaccurate quantities.

The plaintiff sued the defendant, an architect, to recover damages

(*f*) *Trent and Humber Co., In re* (1868), L. R. 6 Eq. 396.

(*g*) *Corbett v. Richmond* (1888), *Building News*, May 18.

(*h*) (1884) 12 L. R. (Ir.) 321.

(*i*) *Bolt v. Thomas, Beven on Negligence* (1895), vol. ii., p. 1370; *Times*, August 10, 1893.

for supplying to the plaintiff an inaccurate statement of the quantities of work and materials required for the erection of a building which the plaintiff had contracted to erect. The defendant advertised for tenders for the erection of a Baptist chapel, stating that the plans and specifications could be seen, and that the quantities of work and material would be furnished. The plaintiff obtained from the defendant's office a table of such quantities, headed by a statement that it was to be paid for by the successful competitor. From this table the plaintiff calculated his tender, which was accepted. For the plaintiff it was contended that, independently of the computation, there was an implied undertaking in law that the bill of quantities paid for by the plaintiff should be reasonably correct. For the defendant it was contended that there was no contract between the architect and builder, that the committee had stipulated with the plaintiff that he should pay the architect, and that the architect was not liable to the builder for any inaccuracy in the quantities. Byles, J., in summing up, directed the jury that the defendant had stipulated that the plaintiff should pay him for the calculation of the quantities, and, having been paid for them by him, the defendant was liable to compensate him if the bill was not reasonably correct. The jury found for the plaintiff.

The consequences of negligence do not, however, stop short at making good the immediate monetary loss which may be sustained. A faulty design may involve disaster and personal injuries, for which the engineer may be held civilly responsible.

In *Mosdell v. Mitchell* (k) the widow of a workman brought an action under Lord Campbell's Act against a building owner, his contractor and architect, for the loss of her husband. It appeared that the plaintiff's husband had been one of the workmen engaged in erecting certain houses, of which one of the defendants was the architect, and another the builder. After the houses had been partly erected they fell, and the plaintiff's husband was buried among the falling walls and killed. It was shown that the fall of the building was due to a wall being too slight to bear the strain put upon it. During the hearing the jury, on the suggestion of the judge (Lord Coleridge, C.J.), stopped the case as against the building owner; but in the result they found a verdict for £500 against the builder and the architect jointly. It is possible, therefore, that if a house were to fall owing to the faulty design of an architect, he might be held responsible in damages.

(k) The *Times*, January 20, 1891.

An architect has also been found guilty of negligence in giving certificates. (*l*)

Where work is of a special character.

While, however, failure in the construction of an ordinary building may be evidence of want of competent skill, failure in doing something which is quite out of the ordinary may be consistent with skill. Where, for instance, architects having been employed to put on a new patent concrete roofing, the roofing proved a failure. An action for negligence was brought against the architects. The jury found a verdict for the plaintiff, damages £50, with the statement that they were of opinion that the novelty of the experiment was a sufficient cause for the leakage, but considered the defendant was bound to make the roof watertight. The Court held this was substantially a verdict for the defendants. (*m*)

For the purposes of sect. 116 of the County Courts Acts, 1888, claims by an employer against an architect for breach of duty arising out of his employment for not exercising due supervision, are claims in contract, not in tort. (*n*)

Damages for negligence.

Where a person undertakes and is employed in performing a work of skill and labour, and fails therein so that his employer derives *no benefit* from the work, the former is not entitled to recover payment, as the employer buys both his labour and his judgment, and he ought not to undertake the work if he does not know whether he can succeed or not. (*o*) If, therefore, architects or surveyors make estimates, which turn out to be incorrect to a considerable amount, and of no use, through their omitting to take ordinary precautions, as to examine the ground for the foundation of the work, they may not be entitled to recover anything for plans, specifications, or estimates made for that work. (*p*) If, however, the incorrectness of the estimate arises from latent difficulties in the work itself, which could not be discovered or provided against by the exercise of competent skill and care, it is submitted that the employer will not be relieved from the obligation of payment.

Recovery of fees already paid.

But in order to recover back fees already paid, the employers must apparently be able to show a total failure of consideration. In a recent case the plaintiffs authorised the defendant, an

(*l*) See *Armstrong v. Jones*, *Builder*, January 1, 1870.

(*m*) *Turner v. Garland*, *Builder*, June 18, 1853.

(*n*) *Steljes v. Ingram*, 19 T. L. R. 534.

(*o*) *Per Bayley, J.*, in *Duncan v. Blundell*, 5 Stark. 6.

(*p*) *Money Penny v. Hartland*, 1 C. & P. 352; *Whitty v. Lord Dillon*, 2 F. & F. 67; and see *Nelson v. Spooner*, 2 F. & F. 613.

architect, to prepare plans, etc., and to employ a surveyor to take out quantities for a building on a certain site. He did the work and was paid for it. Subsequently it was discovered that he had never measured the site, and that the building planned by him would not cover the whole site. It was held that there had not been a total failure of consideration entitling the plaintiffs to recover back the defendant's fee; but that the plaintiffs were entitled to recover by way of damages the actual cost to them of adapting the plans to the site. (g)

A *dictum* of Wright, J., (r) as to what would have been a reasonable course for the plaintiffs to pursue is worth recording. He said: "The defendant himself would have made the plans good without any charge. Indeed, he would have been bound to do so. If, however, the plaintiff had called in another architect, he would in all probability have insisted on commencing the plans *de novo*, and would have refused to make any use of the defendant's plans. But would that have been a reasonable course to pursue? I do not think it would. One of the first principles of the law of damages is that a plaintiff who has suffered damage must act reasonably, and not incur unnecessary expense against the defendant."

Measure of damages.

The fees are not the full measure of damages. It has been held that a valuer employed to value property proposed as security for a mortgage is liable to his employer for omission to use due skill, care, and diligence in making the valuation. The measure of damages is the loss and expense caused to the employer in direct consequence of the negligence. (s)

SECT. IX.—ARCHITECT IN HIS CAPACITY AS ARBITRATOR.

In the exercise of some of his functions, the architect acts as an arbitrator between builder and building owner. In his capacity as arbitrator he cannot be held liable for negligence; but an action may be brought against him for fraud. The question whether an architect is acting as an arbitrator is by no means easy to determine. For some of the purposes of a building contract he may be merely acting as the agent of the building owner: thus in supervising and inspecting the work of the builder he would be acting merely as agent, and be liable for any damages resulting from his

(g) *Columbus Co., Ltd. v. Clowes* (1903), 1 K. B. 244. See also, as to damages, *Jameson v. Simon*, p. 78, *supra*; *Trent and Humber Co., In re, supra*.

(r) At p. 247 in the L. R.

(s) *Cralle v. Brinsley*, 4 T. L. B. 11; but to recover the damage, it must be shown that the employer acted on the faith of the valuation, and did not use his own judgment in making the advance, *ib.*

If arbitrator, not liable for negligence. negligence. (s) But his duties may be those of an arbitrator, or *quasi* arbitrator; and it is now settled that no action can be maintained against him in respect of his exercise of those duties. (t)

In *Chambers v. Goldthorpe*, and *Restell v. Nye*, (u) a building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the price of the works during their progress, and for payment of the balance after their completion upon certificate of the architect. By Clause 20 of the contract it was provided as follows: "A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractor, is to be conclusive evidence of the works having been duly completed, and that the contractor is entitled to receive payment of the final balance, but without prejudice to the liability of the contractor under the provisions of clause No. 12." In an action brought by the architect for his fees, the building owner filed a counterclaim alleging that the plaintiff had been guilty of negligence in incorrectly measuring up work done and in improperly allowing certain items, and that consequently he had certified for a larger amount than he should have done. The Court of Appeal (A. L. Smith, M.R., and Collins, L.J.; Romer, L.J., dissenting), held that the architect, in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of those functions. Referring to the clause above set out, the Master of the Rolls said: (x) "I cannot come to the conclusion that the architect's sole duty was to protect the interests of the building owner against the builder. I think that under that clause he owed a duty to the builder as well as to the building owner. The effect of his agreeing to act under this clause was that he undertook the duty towards both parties of holding the scales even and deciding between them impartially as to the amount payable by the one to the other."

Collins, L.J., said: (y) "With regard to the case of *Wadsworth*

(s) See, for instance, *Jameson v. Simon* (1899), 1 F. 1211, *ante*, p. 78; and a Canadian case, *Badgley v. Dickson*, 13 Ont. App. 494, cited in *Even on Negligence*, vol. ii., p. 1375.

(t) As to the interference of the Court in a case where an arbitrator is biassed, see cases cited, p. 103, *post*.

(u) (1901) 1 K. B. 624.

(x) At p. 634.

(y) At p. 641.

v. Smith, (z) which was relied on by the appellant, I think it is open to the distinction which I pointed out when it was cited. The question there was whether a building contract, providing that the architect's certificate was to be final between the parties as to certain matters, was a submission to arbitration within the Common Law Procedure Act, so as to admit of being made a rule of Court; and it was to this point that the observations in the case were addressed. If such a contract were a submission, the architect would be in the full sense of the term an arbitrator. This is presumably the reason why, in the subsequent cases, the Court has been careful to refer to persons similarly situated as 'quasi arbitrators'—that is, persons not acting under a formal submission, but nevertheless, for certain purposes, regarded as being in the same position as arbitrators."

SECT. X.—DEALINGS BETWEEN ARCHITECT AND BUILDER.

An agent is not allowed to make any profit out of the agency, without the knowledge and consent of his principal, beyond his proper remuneration; and any sum of money, so obtained by an agent from any other source, must be accounted for to the principal, who may claim it as money received to his use. (a) Where, therefore, an engineer (and this case, again, equally refers to an architect) entered into a sub-contract with the contractor, without the knowledge or consent of the employer, it was held that any surreptitious dealing between the contractor and the engineer was a fraud, and entitled the defrauded employer, if he came in time, to have the contract, which was entered into without his knowledge or consent, rescinded, and to refuse to proceed with it in any shape. (b)

(z) L. R. 6 Q. B. 332.

(a) *Morrison v. Thompson*, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; *Great Western Insurance Co. v. Cunliffe*, L. R. 9 Ch. 525; *Hay's Case*, L. R. 10 Ch. 593; *Carling's Case*, 1 Ch. D. 115. See per Cairns, L.C., in *Parker v. Mackenna*, L. R. 10 Ch. 118. As to fraud in making or inviting tenders, see *Salford (Mayor of) v. Lever* (1891), 1 Q. B. 168, noted *ante*, p. 24. See also the Prevention of Corruption Act, 1906, s. 1.

(b) *Panama, etc., Telegraph Co. v. India Rubber, etc., Co.*, L. R. 10 Ch. 515, 527; *Harrington v. Victoria Dock Co.*, 3 Q. B. D. 549; *Smith v. Sorby*, 3 Q. B. D. 552; and see *Cutter v. Powell*, 2 Sm. L. C. 1; *Planché v. Colburn*, 8 Bing. 14; *Palmer v. Temple*, 9 A. & E. 598; *Keys v. Harwood*, 2 C. B. 305; *Ex parte James*, 8 Ves. 337; *Randall v. Errington*, 10 Ves. 423; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189; *Dunne v. English*, L. R. 18 Eq. 524; and see *Ravelin v. Wickham*, 3 De G. & J. 304; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Hartram v. Lloyd*, 90 L. T. 357; 20 T. L. R. 281. See also *Shallcross v. Hergyl* (Builder, May 10, 1906), where an architect, in breach

The Court will not inquire into the motive of the person who gives a bribe, and there is an irrefutable presumption that the person receiving it was influenced by it. (c)

Commission
may be
recovered.

It is probable, moreover, that the building owner would be entitled to recover from the architect any commission which he had paid him. So where property had been sold by an agent for a principal, and the agent was paid commission on the sale by the principal, the latter, on discovering that the agent had received a commission from the purchaser, was held entitled to recover the commission which he had paid to the agent. (d)

Whole con-
tract may be
vitiating.

In a recent Scots case (e) cross-actions were brought by an English engineering firm and an Aberdeen manufacturing company, the former suing for the price of machinery furnished, and the latter for damages in respect of defects, and for the payment of a commission by the English firm to a consulting engineer, through whom the Scottish company had conducted the negotiations. This gentleman was professedly acting for the buyers, and was paid by them; but he so planned the specifications that there was practically no competition for the work, and it was given to the English firm, with whom he had previously arranged a commission. The existence of the secret commission was only discovered by the buyers in the course of correspondence regarding the alleged defects. The sheriff-substitute held that the commission paid by the sellers to the buyers' agent had increased the price to the buyers' injury, and that the buyers were upon this ground entitled to succeed. He also held that inasmuch as fraud, in the legal sense, had entered into the contract, the buyers were not bound by the ordinary rules as to rejection or notice, and that damages might be awarded for defects, although the buyers had kept the whole plant and had used part of it in their business steadily for four or five months. A considerable sum as damages was awarded to the buyers, in addition to repayment of the commission paid by the sellers to the buyers' agent. The result of the engineer's conduct was that the entire contract was vitiated, and the company who purchased the machinery were entitled to

of duty to his employer, allowed builders to contract to do certain work for a certain sum, whereas, in fact, they were employing sub-contractors to do the work for a much smaller sum.

(c) *Hovenden v. Millhoff* (1900), 83 L. T. 41; *Shipway v. Broadwood* (1899), 1 Q. B. 369.

(d) *Andrew v. Ramsay & Co.* (1903), 19 T. L. R. 620; and see also *Hippisley v. Kneec*, 21 T. L. R. 5.

(e) *Leeds Engineering Co. v. Roberts* (1902), Shf. Ct. R. 54.

damages for defects which made themselves apparent only after the lapse of a considerable time.

SECT. XI.—UNDISCLOSED AGREEMENT WITH EMPLOYER.

So, on the other hand, the architect should not, without the knowledge of the builder, enter into a secret contract or engagement with the employer. If, besides the contract between the employer and the builder, there is a contract between the employer and the architect, not communicated to the builder, that the outlay shall not exceed a given sum, and the builder is, by the contract, subject to the orders of the architect as to what works he shall execute; this agreement is not binding upon the builder, and such restriction of the architect's authority by contract, as agent for the employer, cannot in any respect prejudice the builder's rights. (f) "Without imputing corruption to the architect, it is enough if there was a circumstance tending to his good judgment which was unknown to the plaintiff." (g)

SECT. XII.—AUTHORITY OF ARCHITECT.

(a) *Where employed to prepare Plans.*—An arrangement by which an architect is merely employed to prepare plans is an ordinary contract for fixed services at an agreed amount of remuneration, and no question of his authority can, in this case, arise. Where plans only are prepared.

(b) *Where employed to superintend Work.*—Where an architect is engaged to superintend the erection of the works, he becomes the agent of the employer generally for all purposes *within* the contract connected with the erection of the building, (h) and the ordinary rules as to the rights and duties of agents of a general character, and having a recognised apparent authority incident to their character, will be applicable. His authority may be either expressly given, or inferred from the acts of his supposed employer. When it is, as it should be, expressly given, there can be no doubt Where he is engaged to superintend work.

(f) *Kemp v. Rose*, 1 Giff. 258; *Kimberley v. Dick*, L. R. 13 Eq. 1; *Scott v. Corporation of Liverpool*, 3 De G. & J. 334; and see other cases, p. 104, *post*, Chap. VIII., under "Certificates."

(g) *Per Stuart, V.C.*, in *Kemp v. Rose*, *ubi supra*, at p. 266. See also cases noted, *ante*, p. 38.

(h) *Kimberley v. Dick*, L. R. 13 Eq. 10; and see *Scrivener v. Pask*, 18 C. B. N. S. 785. As to the architect's authority to employ quantity surveyor, see *ante*, Chap. III., p. 10.

as to its extent, except from the uncertainty of words employed in delegating it. (i) When, however, it is to be inferred from the conduct of the employer, that conduct furnishes the only evidence of its extent, as well as of its existence; and, in solving all questions on this subject, the general rule is, "that the extent of the agent's authority is (as between his employer and third parties) to be measured by the extent of his usual employment. (k) As to breach of duty in carrying out the work of supervision, see p. 78, *ante*.

It has been held that an architect who is employed to superintend the building of a house in accordance with approved plans has no implied authority to allow adjoining owners to build the projecting ends of their stanchions and roof beams into the wall of the house. (l)

(c) *Delegation of Authority*.—While the maxim "*Delegata potestas non potest delegari*" applies to an architect in the performance of his duties, he may employ subordinates to carry out the details of his work. In a recent case, (m) it was the duty of an architect to inspect, and if necessary reject, the materials used by the plaintiff in carrying out a building contract. If the plaintiff refused to obey the directions of the architect, the defendants had power to terminate the contract. The architect, having ascertained that certain timber was being used in the building, gave directions to the clerk of the works that he was not to allow it to be used, and the clerk of the works marked the pieces objected to. The contractors having refused to obey the directions of the clerk of the works, the defendants terminated the contract. It was held by the Court of Appeal that the architect having first ascertained that portions of the timber were not of the stipulated quality, he

(i) *Sm. Merc. Law* (11th ed.), p. 155. As to when an express authority may be enlarged by one implied from employment, see *Pole v. Leask* (1860), 29 L. J. Ch. 888; *Fleming v. Bank of New Zealand* (1900), A. C. 577.

(k) See *Sm. Merc. Law* (11th Ed.), p. 135, *et seq.*, as to law generally on rights and duties between principal and agent. In an American case (*Leverone v. Arancio* (1901), 179 Mass. 439) it was provided that "the contractor, under the direction and to the satisfaction of the architect, acting for the purposes of this contract as agent of the said owner, shall and will provide all the materials, and perform all the work mentioned in the specifications and shown in the drawings." It was held that this did not go further than to make the architect the agent of the owner in the matter of deciding whether the work done fulfilled the requirements of the specifications and drawings, and did not give him authority to waive, on behalf of the owner, the terms on which the owner had stipulated that the payments were to be made when the work described had been done to the architect's satisfaction.

(l) *Betts v. Pickfords* (1905), 2 Ch. 87.

(m) *Graham v. Commissioners of Works*, Appendix, p. 670.

was entitled to delegate the duty of particularising what timbers were to be removed. (n)

(d) *Authority as General Agent.*—The architect, as a general agent, therefore, has the full apparent authority due to his position, and the employer is bound by his acts within that authority, notwithstanding special instructions restricting that authority, which are not known to the builder. (o) Where the terms of the agreement between the employer and the builder are general, and do not define, or only in part, or indistinctly define, the nature and extent of the architect's authority, in the absence of specific instructions, it is the architect's duty to pursue the accustomed course, which, if reasonable, the Court will support.

Where a builder contracts to do work according to plans and specifications, and the specification provides that the work is to be done to the satisfaction of the architect in every respect, the architect is not entitled to sanction deviations from the plans, and the proprietor is not bound by the architect's certificate to accept any work other than that contracted for. (p)

(e) *Where Authority limited by Agreement.*—But where the limits of the architect's authority are clearly set out, as is usually the case, by express terms in the agreement between the employer and the builder, the authority must be strictly followed, as an employer will not be liable for the acts of the architect unless the authority be duly pursued by him. (q) At the same time, the Courts are so far liberal in construing authorities given to agents, that they will hold them to include permission to use all necessary, or even usual, means of carrying the main intention of the principal into effect in the best manner. (r)

Sometimes the contract provides that the architect shall have power to dismiss the builder if he is guilty of delay. For a case in which this right was held to be subject to the arbitration clause, see p. 153, *post*.

(n) See also the Scots case of *Kirkwood v. Morrison* (1877), 5 Ct. of Sess. Cas. (4th ser.) 79; and the American case of *Palmer v. Clarke* (1871), 106 Mass. 378, which are authorities to the same effect. But see cases, p. 90, *post*.

(o) *Kimberley v. Dick*, L. R. 13 Eq. 17. See *post*, p. 187, as to order for "extras."

(p) *Ramsay v. Brand* (1898), 25 F. 1212.

(q) Byles, J., in *Parks v. Prescott*, L. R. 4 Ex. 182, citing Bacon's Maxims 16, "Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam."

(r) *Richardson v. Anderson*, 1 Camp. 43 n.; *Johnston v. Kershaw*, L. R. 2 Ex. 82; *Ireland v. Livingston*, L. R. 2 Q. B. 99; *Ib.*, 5 Q. B. 516; *Ib.*, 5 H. L. 395. But see *Robinson v. Mollett*, L. R. 7 H. L. 802.

(s) *Foster v. Hastings* (*Mayor of*), 87 L. T. 736.

Authority of
architect to
dismiss
builder.

Where he makes building contract.

In an agreement by an architect on behalf of his principal, for building a house, etc., the principal will be bound, although no special authority to make the specific contract be proved, so that the general authority be sufficient to comprehend the terms of the agreement. (*t*)

Personal liability.

Under certain conditions an architect may make himself personally liable for materials ordered by him for the purpose of carrying out the work. So where an architect makes a contract in his own name without naming his principal, and without expressly excluding his liability, he makes himself personally liable. (*u*)

Architect's certificate.

The law as to architects' certificates and extras is considered in subsequent chapters. (*w*)

Authority to order "extras."

Architect cannot delegate authority.

Distinction between rule and exercise of a power impliedly given.

Architects entrusted with authority involving a trust or discretion cannot delegate it to another without a special authority to do so, as expressed by the maxim, "*Delegata potestas non potest delegari*." For where a man employs an agent, relying upon his peculiar aptitude for the work entrusted to him, it is not competent to that person to delegate the trust to another. (*x*) But this rule must be distinguished from cases where he does not so much delegate his agency, as exercise a power impliedly contained in his appointment; in doing which he must act with precaution, and not exceed what is proper under the circumstances of the case, and warranted by the usage. An architect might be justified in retaining a surveyor to take out quantities, but he could not delegate the whole of his duty. So where an architect was employed to draw a specification, and he employed a surveyor to take out the quantities, the Court decided that the surveyor, though he had no communication with the employers, might sue them for remuneration, having first proved that the architect, in employing him, had acted in accordance with the custom. (*y*)

Appointment of clerk of the works.

It may not be irrelevant here to state that the clerk of the works is the person chosen by the architect to superintend the work, and

(*t*) *Hall v. Holt*, 2 Vern. 322; *S.C. Duchess of Marlborough v. Strong*, 5 Vin. Ab. 533. See *Fenn v. Harrison*, 3 D. & E. 757; *Wyatt v. Marg. Hertford*, 3 East, 147. As to the effect of an alteration by the architect in the contract, see *Pattinson v. Luckley*, L. R. 10 Ex. 330.

(*u*) *Beigtheil and Young v. Stewart*, 16 T. L. R. 177.

(*v*) *Post*, Chap. VIII.; and see *Stevenson v. Watson*, L. R. 4 C. P. D. 148; *Chambers v. Goldthorpe* (1901), 1 K. B. 482, *ante*, p. 84; and *post*, p. 96, as to the architect's position as an arbitrator. See *post*, Chap. XIV.; *Rex v. Peto*, 1 Y. & J. 37; *Cooper v. Langdon*, 9 M. & W. 60.

(*x*) *Per Williams, J.*, in *Hemming v. Hale*, 7 C. B. N. S. 498; see 9 Co. 75 (*b*); *Coombe's Case*; *Coles v. Trecothick*, 9 Ves. 236, 251, 252.

(*y*) *Moon v. Witney Guardians*, 3 Bing. N. C. 814. See *ante*, Chap. III., p. 10, *et seq.*, as to architect ordering "quantities."

to see that the materials and labour are of the nature shown in the drawings, or specified and described in the agreement. He is paid by the employer, and is the medium through whom the orders of the architect are conveyed to the builder; but he has no authority to make any alterations or changes in the work without the instruction of the architect or employer. A clause providing that a clerk of the works shall be appointed, and that he shall be subject to the orders and directions of the architect, is often inserted in the agreement between employer and architect.

SECT. XIII.—RESULT OF ACTING WITHOUT AUTHORITY.

If an architect orders materials or does some act professing to contract for the employer, he impliedly warrants to the other contracting party that he in fact possesses the authority he assumes to exercise; and he becomes liable to an action for the breach of such warranty. Action for breach of warranty of authority.

Where, for instance, an architect employs a quantity surveyor without authority in that behalf, the quantity surveyor may sue him for breach of warranty of authority. (z) "The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority, which he professes to have, does in point of fact exist." (a) If he know at the time that he does not possess the authority, he would be liable to a claim for damages for deceit. (b) So a builder recovered from an architect not only the value of building materials ordered by him without authority, but also, as damages, the costs of an action against the supposed employer, which had failed for want of the authority to bind him, such action being the direct consequence of the assertion of the architect that he had such authority. (c) False representation.
Measure of damages.

(z) See *Antisell v. Doyle* (1899), 2 Ir. R. 275, noted *ante*, p. 12; and see also *Michel v. Day, Builder*, July 6 and July 12, 1906.

(a) *Per Cur.* in *Collen v. Wright*, 7 E. & B. 301; and see cases under *Thomson v. Davenport*, 2 Sm. L. C. (11th ed.) 380, 381, 382; *Simons v. Patchett*, 7 E. & B. 508; *Pow v. Davis*, 1 E. B. & S. 220; *Hughes v. Graeme*, 33 L. J. Q. B. 335; *Firbank v. Humphreys*, 18 Q. B. D. 51; *Elkington v. Harter*, [1892] 2 Ch. 452; and see also *Oliver v. Bank of England* (1902), 1 Ch. 610.

(b) See *Lewis v. Nicholson*, 18 Q. B. 503; *Jenkins v. Hutchinson*, 13 Q. B. 744; *Kelner v. Baxter*, L. R. 2 C. P. 174, as to agent being liable on contract where no principal in existence.

(c) *Randell v. Trimen*, 18 C. B. 786; and see *Hughes v. Graeme*, 33 L. J. Q. B. 335; *Spedding v. Nevell*, L. R. 4 C. P. 212.

Doubt as to
architect's
authority.

Indemnity of
architect.

Where such a question arises, it would now be competent for the builder to join both the alleged principal and the architect in the same action, and claim a remedy in the alternative; against the one as principal, if the architect had authority to bind him, and against the architect, if he acted without authority. (*d*) And an architect, charged upon a contract, or for any other act, upon his own personal liability, may serve upon his employer a notice of claim to indemnity for that act, and thereby make him a party to the proceedings. (*e*)

(*d*) *R. S. C.* 1883, Order 16, r. 7; *Honduras Ry. Co. v. Lefevre and Tucker*, 2 Ex. D. 301.

(*e*) *R. S. C.* 1883, Order 16, r. 48. *Per Cur. in Adamson v. Jarvis*, 4 Bing. 72. See *Dugdale v. Lovering*, L. R. 10 C. P. 196; *Benecke v. Frost*, L. R. 1 Q. B. D. 422; *Bower v. Hartley*, L. R. 1 Q. B. D. 652.

CHAPTER VIII.

APPROVAL OF WORK AND CERTIFICATES.

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SECT. I.—APPROVAL OF WORK.

(1) GENERALLY.

IN all building contracts it is usually made a condition precedent to payment, and in agreements for building leases to the granting of the lease by the lessor, that the building shall be completed to the satisfaction or approval of the employer, or of both employer and architect, or, as is customary, of the architect.

(2) APPROVAL OF WORK BY EMPLOYER.

As a general rule, where payment by the employer is made conditional upon his approval of the work, (a) the right of approval, Contract conditioned upon approval of employer.

(a) See *Moffatt v. Dickson*, 13 C. B. 543, cited *ante*, p. 73; and see *Moffatt v. Lawrie*, 15 C. B. 583, cited *ante*, p. 73. For the general rules laid down as to conditions precedent, see *post*, Chap. XIX., under "Covenants."

on which the contract is dependent, must be exercised in a reasonable and not arbitrary or capricious manner, as stipulations and conditions of this kind should, where the language of the contract admits of it, receive a reasonable construction, and it will always be a question for the jury to determine, whether the employer has acted *bonâ fide*, and ought reasonably to have been satisfied with the work done. (b) But where by the terms of the agreement it is stipulated that the satisfaction or approval shall be quite arbitrary, then, however unreasonable and oppressive the stipulation or condition may be, the only restriction upon the right is, that it must be exercised in good faith, and not merely for the purpose of defeating the contract. (c)

Employer to
have oppor-
tunity of
inspection.

Where a building contract provides for the inspection or approval of the work by the employer before payment, he must be afforded an opportunity of inspection before he can be called upon to pay; but he cannot, by withholding his approval unreasonably and *malâ fide*, after an opportunity of inspection has been afforded him, deprive the builder of payment. (d)

SECT. II.—CERTIFICATES.

In building contracts it is usually made a condition of payment for the work done, that the architect shall give his certificate of approval. The following remarks will, of course, equally apply in the case of a certificate by a surveyor or an engineer.

(1) CERTIFICATES DEFINED.

(a) *Progress certificates*.—Certificates are of two kinds, “progress certificates” and “final certificates.” Certificates, given from time to time by the architect during the progress of the work, merely

(b) *Dallman v. King*, 4 Bing. N. C. 105; *Parsons v. Sexton*, 4 C. B. 899; *Hughes v. Lenny*, 5 M. & W. 193.

(c) *Stadhard or Stannard v. Lee*, 3 B. & S. 364. And see *Andrews v. Belfield*, 2 C. B. N. S. 779, where a carriage builder undertook to build a carriage “which should meet with my [the defendant’s] approval, not only on the score of workmanship, but also that of convenience and taste.” It was held that the defendant, having found faults in the carriage, was entitled (acting *bonâ fide*, and not from mere caprice) to reject it. It is probable that if there had been evidence that the rejection was capricious, the decision would have been otherwise. Cf. *Walker v. L. & N.-W. Ry.*, 1 C. P. D. 518.

(d) *Dallman v. King*, *supra*; *Andrews v. Belfield*, *supra*. See Pothier, *Louage*, No. 147. “Ces termes, si je suis content de l’ouvrage, ne doivent pas être entendus en ce sens, que le locateur puisse être admis indistinctement à dire qu’il n’est pas content de l’ouvrage, pour se dispenser de payer la gratification promise, ce qui rendrait cette clause nulle et illusoire.”

control the payments made by the employer by way of advances to the builder; such certificates are clearly defined by Lord Cairns, L.C., (e) as being simply statements of a matter of fact, namely, what is the weight, and what is the contract price, of the materials actually delivered from time to time upon the ground; and the payments made under these certificates are altogether provisional, and subject to adjustment or to readjustment at the end of the contract. Of course the "progress certificate" also includes the value of the labour on the work executed from time to time. (f)

(b) *Final certificates*.—The final certificate is the certificate given by the architect on the completion of the work, when the whole contract has been carried out to his satisfaction, and by virtue of which the balance of the contract price is made payable to the builder.

(2) DISTINCTION BETWEEN PROGRESS AND FINAL CERTIFICATES.

The following case illustrates the distinction between "progress certificates" and "final certificates." A contract provided that all the works should be left complete and clear, to the satisfaction of the architect, and did not contain any provision for payment by instalments; it was held that the builder was not entitled to recover for the value of work done, as to which, while incomplete, the architect had expressed approval so far as then partially executed, but which was not subsequently completed to the architect's satisfaction. (g) (See also cases cited p. 105, *post*.)

(e) *Tharsis Sulphur and Copper Co. v. M'Elroy & Sons*, 3 App. Cas. 1045.

(f) The contract sometimes provides that the progress certificate shall not prejudice the final settlement. For an example of a clause to this effect, see *post*, p. 396.

(g) *Richardson v. Mahon*, 4 L. R. Ir. C. P. 486. See *Tharsis Sulphur Co. v. M'Elroy*, 3 App. Cas. 1040, *post*, p. 184. It was decided in a case at the Cape that circumstances may arise which will justify the Court in holding a certificate to be "final" in the sense that the builder may sue upon it, although it is not "final" in the sense that it is a representation that the work has been entirely completed. A building contract provided that the work should be done under the superintendence and to the satisfaction of the architect, and that payments should be made from time to time on certificates from him for work done and completed, the employer, however, being entitled to retain 20 per cent., to be devoted towards making good any defects which might appear within two months of the completion of the building. A certificate was granted by the architect setting out the existence of certain defects and recommending payment of the balance still due on the contract on these defects being remedied, and on this being done the employer paid the builder. It was held that, in the circumstances, the certificate was equivalent to a final certificate: *McCarthy v. Fisser* 1905, Sup. Ct. (Cape of Good Hope) Rep., p. 122.

(3) AMERICAN CASES RELATING TO CERTIFICATES.

Form of
certificate.

Where, according to an American case, a contract for railroad construction provided that on the certificate of the chief engineer that the work had been completed agreeably to the contract, together with his estimate of the quantity of the various kinds of work done thereunder, which estimate should be conclusive between the parties, the defendant would pay the contractor the amount fixed, and the engineer certified that he had accepted "clearing on main line extension" between certain specified stations, comprising a certain number of acres, this certificate was held to be conclusive that he had accepted the work which had been done under the contract as modified by subsequent agreement, although the certificate was not in the language of the contract, that the contractor had "fully completed and finished agreeably to the various stipulations and specifications of the agreement." (*h*)

Contractor
required
to sign
certificate.

In another American case (*i*) the specifications of a building contract contained the following provisions: "Before any final estimate shall be allowed by the architect in charge, the contractor will be required to sign a certificate on the said estimate that he will accept the same as a settlement in full for all claims against the owner on account of work done under this specification and contract. The contractor shall also sign and duly attest a statement, before final payment is made, that all claims for materials provided or labour performed on this property are paid and satisfied in full, and that there are no claims whatsoever against the owner of this property." It was held that the foregoing requirements were conditions precedent which the contractor must fulfil before he could sue on the contract.

(4) LEGAL EFFECT OF A CERTIFICATE.

(*a*) *Whether Certificate is an Award.*—It seems that the ordinary clause in building contracts, that the certificate of the architect should be conclusive as to the work done, and the mode of doing it, is not an agreement or submission to arbitration, (*k*) so that it can be made a rule of Court. (*l*) And the certificate of the architect

(*h*) *Eastham v. Weston Construction Co.*, *Washington* (1905), 77 P. 1051; 36 Wash. 7.

(*i*) *Leverone v. Arancio* (1901), 179 Mass. 439. See also *Duque v. Levy* (1905), 37 So. 995; *Heidlinger v. Onward Const. Co.* (1905), 90 N. Y. S. 115.

(*k*) *Wadsworth v. Smith*, L. R. 6 Q. B. 332. See *Lawson v. Wallasey L. B.*, 52 L. J. Q. B. 302, and in Court of first instance, 11 Q. B. D. 229.

(*l*) See *per* Collins, L.J., in *Chambers v. Goldthorpe* (1901), 1 Q. B. at p. 641.

is not an award, nor is it liable to be examined as such. (m) So where the contract has provided that the certificate of the architect should be a condition precedent to payment, the Court will not obtain jurisdiction because of the power to refer to arbitration. (n)

Nevertheless, the certificate of an architect will, under certain conditions, be treated as the award of an arbitrator in the sense that an action for negligence cannot be maintained by the building owner against the architect for alleged negligence in granting the certificate. (o) In other words, the architect may occupy the position of a *quasi* arbitrator.

Illustrative cases.

In *Stenson v. Watson*, (p) where the contract provided that the amount of additions should be ascertained by the architect in the same manner as the "quantities" had been measured, and that the employer and the contractor would be bound to leave all questions or matters of dispute to the architect, whose decision should be final, and that the contractor would be paid on the certificate of the architect; it was held, that the functions of the architect in ascertaining the amount due to the contractor were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied a similar position to that of an arbitrator.

Where a contract for the sale of locomotives provided for payment upon the certificate of the purchaser's engineer that they were in perfect order, and contained another clause that "all disputes are to be settled by arbitration," and the engineer having refused his certificate, the vendors proceeded under the arbitration clause, it was held, that "a dispute" had arisen within the clause, and that the award made was enforceable as such. (q)

(b) *When Certificate is a Condition precedent to Payment.*—The question whether the certificate is a condition precedent to the builder's right to payment is to be determined by reference to the contract between the parties. It cannot be inferred. In a case which was heard in South Africa a clause in a building contract provided that payments were to be made on the certificate of the architect, on the measured value of the work executed, less 20 per cent., one-half of which was to be paid on the completion

^m *Northampton Gas Light Co. v. Parnell*, 15 C. B. 630. See *Sharpe v. San Paulo Ry. Co.*, L. R. 8 Ch. 597.

ⁿ *Sharpe v. San Paulo Ry. Co.*, *supra*.

^o *Chambers v. Goldthorpe* [1901], 1 Q. B. 624, *ante*, p. 84.

^p 4 C. P. D. 148.

^q *Re Hohenzollern Actien, etc.*, 51 L. T. 596. See also *Pappa v. Rose*, L. R. 7 C. P. 32, 325; *Tharsis Sulphur Co. v. Loftus*, L. R. 8 C. P. 1; and see *ibid.*, p. 183, as to the effect of certificates in relation to "extras."

of the work, and the balance six months afterwards, on receipt of the architect's certificate. It was held that the production of the architect's certificate was a condition precedent to the builder's right to recover any portion of the balance. A second contract between the same parties for the performance of other work provided for payment of the contract price upon the completion of the work, and made no mention of the architect. It was held that although while the work was in progress both parties tacitly assumed that the work must be to the satisfaction of the architect, his certificate was not required before payment could be demanded for the work which was admitted to have been completed. (*r*)

(*c*) *Where there has been a Dispute.*—"Where by an agreement the right of one of the parties to have or to do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award; but where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that *may* amount to a submission to arbitration, and the determination, *though in the form of a certificate*, be an award." (*s*)

Upon an agreement to do work at a measurement price, to be settled by a named person, the settlement of the price is a condition precedent, by which the parties are bound, and not a mere reference to arbitration. (*t*)

(5) FINALITY OF A CERTIFICATE.

Effect of
arbitration
clause.

A recent case, (*u*) which involved the discussion of the form of agreement which was sanctioned by the Royal Institute of British Architects, shows that the finality of the architect's certificate may be affected by the arbitration clause. In that case the architect was given a general control over the works which were to be carried out in accordance with his directions and to his satisfaction. By Clause 16 of the contract he was empowered to order the removal of materials not in his opinion in accordance with the specification or his instructions, and the re-execution of the work with proper materials. By Clause 17 the contractor was to make good at his own cost any defects which might appear within twelve months from the completion of the work, arising, in the

(*r*) *Scott v. Sytner* (1891), 9 Jut's Cases in the Sup. Ct. of the Cape of Good Hope, 50.

(*s*) *Wadsworth v. Smith*, L. R. 6 Q. B. 332.

(*t*) *Mills v. Bayley*, 2 H. & C. 36.

(*u*) *Robins v. Goddard* (1905), 1 K. B. 294. See F. VIII., *post*, p. 382.

opinion of the architect, from materials or workmanship not in accordance with the drawings or specification or his instructions, unless the architect should decide that the contractor ought to be paid for the same. Clause 19 related to assigning and sub-letting. Clause 30, after providing for payment of the contractor under certificates issued by the architect, provided that "the architect shall issue his certificate in accordance with this clause. No certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this contract." Clause 32 (w) provided for the reference of disputes to arbitration.

The builder brought an action to recover sums of money alleged to be due on the architect's certificates. The building owner pleaded, by way of defence, that the certificates were in respect of work done and materials supplied, not in accordance with the terms of the contract, but defective and unsuitable, and he counter-claimed on the same ground. Mr. Justice Farwell held that the architect's certificates were conclusive, and dismissed the counter-claim. The decision was reversed on appeal, the Court holding that the arbitration clause destroyed the finality of the certificates; and (*per* Stirling, L.J.) that the provision that no certificate should be considered conclusive evidence as to the sufficiency of work or materials to which it referred was general, and that Clause 30 could not be read as applying only to the liability of the contractor to make good defects. Inasmuch as this is a decision bearing directly upon the construction of a clause

" (w) It was in the following form: "Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder (except as to matters left to the sole discretion of the architect under Clauses 4, 9, 16, and 19, and the exercise by him under Clause 18 of the right to have any work opened up), or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of . . . , and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the question of certificate, shall not be opened until after the completion, or alleged completion, of the works, unless with the written consent of the employer or architect and the contractor. The architect shall have power to open up, review, and revise any certificate, opinion, decision, requisition, or notice, save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition, or notice had been given. . . ."

which is in common use, it is likely to be far-reaching in its effects.

Where there is no arbitration clause, and the architect's certificate is given that a certain balance is due, it is, in the absence of fraud, conclusive. (*x*)

Certificate
may be final
even in case
of fraud.

Further, the parties may agree that a certificate shall not be set aside on the ground of fraud. In *Tullis v. Jackson* (*y*) an agreement between the parties to a building contract that the valuations, certificates, orders, and awards of the architect shall be final and binding, and shall not be set aside, or attempted to be set aside, on any ground or for any reason, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy is, in the absence of fraud on the part of either party, a valid agreement, and not void as being against public policy.

No action can be maintained where the contract shows that the parties intended the final expression of the architect's satisfaction with the entire contract to be conclusive. (*z*) And where a building contract is made determinable upon default in the builder, to be decided upon by the architect, his certificate is conclusive and puts an end to the contract. (*a*) So where a builder undertakes to complete works, to be ordered by an architect, within a given time, the order is conclusive as to the possibility of completing them, and he may be liable for delay. (*b*)

(6) EFFECT OF CERTIFICATE ON PROPERTY IN MATERIALS.

The effect of a certificate upon the property in building materials is dealt with, *post*, p. 180.

(7) FORM OF CERTIFICATE.

A well-framed building contract should provide that the certificate of the architect shall be in writing, as a parol approval will

(*x*) *Arnold v. Walker*, 1 F. & F. 671; *Sharpe v. San Paulo Ry. Co.*, L. R. 8 Ch. 597. See *Lawson v. Wallasey L. Bd.*, 52 L. J. Q. B. 302; and in Court of first instance, 11 Q. B. D. 229. An architect may, however, be held liable for negligence in granting a certificate. See *Armstrong v. Jones, Builder*, January 1, 1870.

(*y*) (1892) 3 Ch. 441.

(*z*) *Dunaberg, etc., Ry. Co. v. Hopkins, Gilkes & Co.*, 36 L. T. 733.

(*a*) *Roberts v. Bury Commissioners*, L. R. 5 C. P. 310; *Wadsworth v. Smith*, L. R. 6 Q. B. 332.

(*b*) See *post*, Chap. XI., p. 140; and *Jones v. St. John's College*, L. R. 6 Q. B. 115. As to the effect of a certificate, when given, with respect to the property in building materials, see *Banbury, etc., Ry. Co. v. Daniel*, W. N. December 20, 1884, p. 243, and *post*, p. 180.

satisfy the condition, unless a written certificate is expressly stipulated for. (c)

If a written certificate be expressly stipulated for, the condition must be satisfied, and the want of writing will be fatal to the builder's claim; (d) nor will the mere want of writing give any ground for relief in equity. (e) Mere checking by the architect of the builder's charges does not amount to such a certificate of satisfaction as to enable the builder to sue the employer. (f) If there be no stipulation to the contrary, the architect's certificate of final completion is sufficient without mentioning the amount remaining due. (g)

(8) EFFECT OF CONDITIONS REQUIRING CERTIFICATES.

When a building contract provides that the builder is to obtain the architect's certificate in writing before payment of any money under the contract, it is a condition precedent to the builder's right to sue upon the contract that such certificate be given by the architect, and no claim can otherwise be made for payment under the contract. (h) The Court has no right to dispense with that which the parties have made a condition precedent, unless, of course, there has been some conduct, on the part of the architect or the employer, which may make it inequitable that the condition

Condition precedent to builder's right to sue.

(c) *Roberts v. Watkins*, 14 C. B. N. S. 592. As to a verbal award being sufficient, see *Hanson v. Liversidge*, Carth. 156, S. C. 2 Vent. 212; *Oates v. Bromil*, 1 Salk. 75; and cases in *Russell on Arbitration* (1906), pp. 186, 187.

(d) See, as to written orders, etc., *Lamprell v. Billericay Union*, 3 Ex. 283; *Russell v. Bandiera*, 13 C. B. N. S. 149, and *post*, p. 149. *Goodyear v. Weymouth Mayor*, 1 H. & R. 67.

(e) *Kirk v. Bromley Union*, 17 L. J. N. S. Ch. 127.

(f) *Morgan v. Birnie*, 3 M. & Scott, 76; 9 Bing. 672.

(g) *Pashby v. Birmingham (Mayor)*, 18 C. B. 2, where the proviso was as follows: "That no payments should be made to the contractors, except on the production of a certificate from the architect, that a certain amount of work had been done, and that the architect should deliver his certificate thereof at the end of every fourteen days;" and "that the contractors should be entitled to receive at the end of every fourteen days the amount for which the architect should have given such certificate, the amount of such certificate to be less, by certain varying proportions, than the value of the work done, until 90 per cent. of the whole should be completed; that no further payments should be made to the contractors until three calendar months after the architect should have certified the completion of the whole work to his satisfaction, when one-half of the remainder should be paid, and the balance at the end of twelve months from the date of the architect's certificate of completion."

(h) *Morgan v. Birnie*, 3 M. & Scott, 76; *Scott v. Corp. of Liverpool*, 28 L. J. Ch. 290; *Dunaberg, etc., Ry. Co. v. Hopkins, Gilkes & Co.*, 36 L. T. 733; *Salford (Mayor) v. Ackers*, 16 L. J. Ex. 6; *Milner v. Field*, 5 Ex. 829; *Glenn v. Leith*, 1 Com. Law R. 569; and see *Grafton v. Eastern Counties Ry.*, 8 Ex. 699.

precedent should be relied on. If nothing of that kind has happened, then the parties are bound by that which they have made a condition precedent. (*i*)

Architect
having given
certificate is
functus
officio.

Work, therefore, which has been done, but not to the satisfaction of the architect, cannot be charged for. (*k*) When the certificate, however, has been given the architect is *functus officio*, and he cannot vary or alter it. (*l*)

(9) CONDUCT OF ARCHITECT IN RELATION TO CERTIFICATE.

Refusal of
certificate,
and when
builder can
claim relief.

The question of the right to recover money under the contract is not affected by the fact that the architect unreasonably and wrongfully refuses to give such certificate; (*m*) or negligently certifies for less than the proper sum; (*n*) or, by the fact that the architect has a personal interest in the work, as being a shareholder in the employer's company. (*o*)

Collusion
between
architect
and owner.

But if the architect has fraudulently refused to certify, in collusion with, and by the procurement of, the building owner, the claim of the builder may be supported against the latter, (*p*) or he may maintain an action against the architect for damages upon the ground of fraud. (*q*) For the builder may recover for work done if

(*i*) *Ib.*, and *Sharpe v. San Paulo Ry. Co.*, L. R. 8 Ch. 597, 612, *per Mellish*, L. J.; *Dunaberg, etc., Ry. Co. v. Hopkins, Gilkes & Co.*, 36 L. T. 733. But see an Irish case, where it was held not to be a condition precedent in an action by the employer against the builder: *Mansfield v. Doolin*, 4 Ir. R. C. L. 17, and *infra*, p. 106.

(*k*) *Dobson v. Hudson*, 1 C. B. N. S. 659.

(*l*) *Jones v. Jones*, 17 L. J. Q. B. 170. The building contract usually provides that bad work should be replaced within a certain time, although the certificates have been given.

(*m*) *Clarke v. Watson*, 18 C. B. N. S. 278; *Milner v. Field*, 5 Ex. 829. This statement of the effect of *Jones v. Jones* was approved in a Canadian case, *Murray v. The Queen* (1896), 26 Can. S. C. Rep. 203, at p. 214. In that case it was held that though the value of the work certified to by the monthly certificates was only approximate, and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final, and could not be reopened and revised by a succeeding engineer. And see *Hotham v. The East India Co.*, 1 T. R. 638.

(*n*) *Stevenson v. Watson*, L. R. 4 C. P. D. 148. See *Murphy v. Bower*, 2 Ir. R. C. L. 507.

(*o*) *Ranger v. Great Western Ry.*, 5 H. L. C. 72.

(*p*) *Batterbury v. Vyse*, 2 H. & C. 42; *Brunsdon v. Beresford*, 1 Cab. & El.; and see *Goodyear v. Weymouth (Mayor)*, 1 H. & R. 67. As to the position of an assignee in case of collusion, see *Wakefield Banking Co. v. Normanton L. Bd.*, 44 L. T. 697, *infra*, p. 131.

(*q*) *Ludbrook v. Barrett*, 46 L. J. C. P. D. 798. No cause of action by builder against architect for mere carelessness, or negligence in certifying: *Stevenson v. Watson*, L. R. 4 C. P. D. 148, *supra*.

the withholding of the certificate be due to the fraudulent interposition of the employer, who prevents the architect from giving the certificate. (r) The employer, however, is not responsible for any misconduct of his architect or surveyor in refusing to certify, not brought about by his instrumentality or interference. (s)

It is as clearly settled in equity, as at law, that where the contract provides that the builder is to obtain the architect's certificate before any payments are made, his certificate must precede any action for the recovery of the money due under the contract; nor is there any claim in equity for the work done, upon the mere ground of the architect's refusal of the certificate, unless the case might be brought within the jurisdiction of the Court on the ground of fraud, or gross misconduct amounting to fraud, on the part of the architect in refusing it, or, it seems, of his wilful neglect or absolute incapacity to perform his duties. (t) Relief, therefore, will be given where there is collusive dealing and concert between the employer and the person whom he has appointed architect, for the purpose of injuring the builder or defeating his claim (u). In equity.
Relief in equity.

(10) BIAS OF ARCHITECT.

Where there is any circumstance calculated to bias the mind of an architect or engineer, unknown to the other party who has submitted to his decision, that is a sufficient ground for the interference of the Court. Thus, where the architect had given an assurance to the employer that the cost of the building should not exceed a certain sum, which was concealed from the builder, it was held to be a fraud upon the builder, and to discharge the condition, and to entitle him to recover for the work done notwithstanding the refusal of a certificate. (w) Rights of builder.

Again, in a Canadian case, (x) the person appointed by the employer to superintend the work and give the certificate was a

(r) See note (p), *supra*.

(s) *Clarke v. Watson*, 18 C. B. N. S. 278, *supra*.

(t) *Scott v. Liverpool Corp.*, 3 De G. & J. 334; *De Werra v. Mellier*, L. R. 16 Eq. 554; *Ambrose v. Dunmow Union*, 9 Beav. 508; *Illiss v. Smith*, 34 Beav. 508. Per Lord Romilly, M.R., in *Sharpe v. San Paulo Ry. Co.*, L. R. 8 Ch. 597, mere allegations of fraud without facts from which fraud will be inferred are not sufficient to avoid a demurrer; and see now *R. S. C.* 1883, Order 19, r. 22.

(u) *McIntosh v. Great Western Ry.*, 2 De G. & Sm. 758; *Waring v. Manchester, etc., Ry.*, 7 Hare, 482; and see *Ranger v. Great Western Ry.*, 5 H. L. C. 72.

(w) *Kemp v. Rose*, 1 Giff. 258; and see *Kimberley v. Dick*, L. R. 13 Eq. 1; *Ormes v. Beadel*, 2 Giff. 166.

(x) *Ludlam v. Wilson* (1901), 2 Ont. L. R. 549.

relation of, and was indebted in a large sum to, the employer. It was held that the relationship, family and financial, of the superintendent to the defendant should have been disclosed to the contractors.

Where
builder is
aware of the
agreement
between the
employer and
his architect.

When, however, the builder is aware of the agreement between the architect and his employer, and of the fact of the architect's interest in consequence, he will be bound by the architect's certificates. (*y*) And when, also, he might have known of the position of the architect or engineer, the certificate is conclusive; so where it was agreed that the decision of the engineer should be final, and the contractor, subsequently discovering that the engineer was a large shareholder in the company, when disputes arose, filed his bill to have the accounts taken; the House of Lords held that this gave no right to relief. (*z*)

The following observations of Bowen, L.J., may be referred to, in order to define the true position of an architect as arbitrator:—

“An engineer (and the same doctrine applies to an architect) could not be expected, nor was it intended, that he should come with a mind free from preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party proposed to exact from the arbitrator of their choice. They knew well that he probably must be committed to a prior view, and that he might not be impartial in the ordinary sense. What they relied on was his professional honour, his position, his intelligence.” (*a*)

Circum-
stances
arising after
agreement.

The circumstances, in consequence of which it is desired to avoid the contract, may arise after the agreement has been entered into. Where payments to a contractor were to be certified by the engineer of a railway company, and he afterwards became lessee of the company at a rent depending on the amount to be so certified for, he was held not to be disqualified on that account. (*b*)

(11) CERTIFICATES IN THEIR RELATION TO EXTRAS.

Certificate
may be final
as to extras.

Where a contract provided that no claim should be made for extras without the written order of the architect, and no such

(*y*) *Scott v. Corp. of Liverpool*, 3 De G. & J. 334; *Buchan v. Melville* (1902), 39 S. L. R. 398, cited *ante*, p. 37.

(*z*) *Ranger v. Great Western Ry.*, 5 H. L. C. 72. See also cases, *ante*, p. 83, as to architect being arbitrator.

(*a*) *Jackson v. Barry Ry. Co.* (1893), 1 Ch. 238.

(*b*) *Hill v. South Staffordshire Ry.*, 11 Jur. N. S. 192. *Sed quare*, the point being unnecessary for the decision of the case.

written order as stipulated for was given, it was held that the *final* certificate of the architect including such extra work was conclusive, and that neither party could raise the question of whether or not there was a sufficient order in writing. (c)

Where, however, a building contract provided that orders for extras were to be signed by the secretary and treasurer of the employers, and countersigned by the architect, and the builder, having completed the work, the architect issued a final certificate which apparently included certain extras not signed for by the secretary and treasurer, it was held that the builder could not recover for such extras. (d)

The certificate may also be conclusive on the question what are extras. And where a contract provided that all extras should be paid for at the price to be fixed by the surveyor, and there was no other clause which provided for determining what were extras, it was held that this condition, standing alone, impliedly gave the surveyor power to determine what were extras. (e)

Although the *final* certificate may be conclusive as to extras for which no written order as stipulated for has been given, yet it appears that this is not the case with *progress* certificates; and where a contract provided that no alterations or additions should be made without a written order from the employer's engineer, and during the execution of the contract the contractors were allowed to erect certain additional works, and the particulars were entered in the "progress certificates," the House of Lords held that these certificates were not written orders, and that the claim was therefore excluded by the terms of the contract. (f)

Progress certificate not final as to extras.

(12) ARCHITECT WITHHOLDING CERTIFICATE.

In cases where the certificate is negligently withheld by an architect, the usual clause, making his certificate a condition precedent to payment, places the builder in a very unfair position. It is always very difficult to prove collusion between the employer and the architect, and unless this can be done, or the particular

Usual clause as to certificate unfair to builder.

[e] *Goodyear v. Weymouth (Mayor)*, 1 H. & R. 67; *Lapthorne v. St. Aubyn*, 1 C. & E. 486. See *Westwood v. Secretary of State for India*, 11 W. R. 261; and see *post*, Chap. XIV., "Extras," p. 182.

[d] *Lorden & Son v. Pryce*, Appendix, p. 664.

[e] *Richards v. May*, 10 Q. B. D. 400; 52 L. J. Q. B. 272; 31 W. R. 708; *Lapthorne v. St. Aubyn*, 1 C. & E. 486, *supra*.

[f] *Tharsis Sulphur Co. v. McElroy*, 3 App. Cas. 1040; *Lamprell v. Billerney Union*, 3 Ex. 283. See *post*, Chap. XIV. See *ante*, p. 95, as to the difference between "progress" and "final" certificates.

case brought within the cases referred to at p. 104, *supra*, the builder is practically left without a remedy.

(13) WHO IS BOUND BY A CERTIFICATE.

Certificate
equally con-
clusive upon
employer.

The architect's certificate when given will, in the absence of fraud, be binding upon the employer under the same circumstances, and to precisely the same extent, as it is conclusive upon the builder. (*g*) Although the employer may incur considerable expense owing to a subsequent discovery that part of the work has not been done as certified, or only imperfectly finished, unless the agreement contains a clause providing that, notwithstanding the architect's certificates, bad work discovered within a certain time after completion must be rectified by the builder, the same rule will apply. (*h*)

Certificate
final as
between
employer and
builder.

But the architect's certificate is final only as between builder and building owner; it is not conclusive as between the building owner and the architect himself; any question between them would not be decided by the certificate. (*i*)

(*g*) *Goodyear v. Weymouth (Mayor)*, 1 H. & R. 67, noted at greater length, *post*, p. 184; *Lapthorne v. St. Aubyn*, 1 C. & E. 486. An Australian case, *Redmond v. Wynne* (1892), 13 N. S. W. Rep. 39, also supports this proposition. But see an Irish case, *Mansfield v. Doolin*, 4 Ir. R. C. L. 17, where it was held that the architect's award was not a condition precedent to an action by the employer against the builder for not completing the buildings, and for leaving them unfinished. Cf. *Connor v. Belfast Water Commissioners*, 5 Ir. R. C. L. 55. See *Jones v. St. John's College*, L. R. 6 Q. B. 115, as to certificate being a condition precedent to the employer's right to a penalty for non-completion of work. As to certificates, see Chap. XI.

(*h*) See *Ayr Road Trustees v. Adams*, 11 Ct. of Sess. Cas. 326, as to a latent defect discovered after settlement; *Cunliffe v. Hampton Wick L. Bd.*, 9 T. L. R. 378. See also *School Board for London v. Johnson*, Appendix, p. 665. In some cases the architect may himself be held responsible for making good such defective work, see *Jameson v. Simon* (1899), 1 F. 1211, p. 78, *ante*. In a recent American case, *Noreross v. Wyman* (1904), 187 Mass. 25, there was a clause in a contract under seal to the effect that "the architects shall be the sole interpreters of their drawings and these specifications, and, except as otherwise provided or specified, their decision upon all questions relative to drawings, specifications, or contract for the said building shall be final and binding upon the owner and the contractor." By the contract, which included the specifications and plans, the contractor was required to provide a suitable foundation for the building. He encountered a quicksand, which required more work than had been anticipated. The architects decided that the expense of the work made necessary by the quicksand was extra work, not included in the contract price. The owner refused to be bound by this decision. It was held that, under the agreement of the parties, the decision of the architects was final, and that for the purposes of their decision they were free to adopt such legal principles as they honestly believed to be applicable, and to act on such evidence as they chose to receive; and whether the contract by its true construction required the plaintiff to excavate the quicksand was immaterial.

(*i*) *Rogers v. James*, 56 J. P. 277. No question arose in this case as to the

But, as before stated, relief will be given if the architect or engineer has entered into some agreement with the builder or contractor, which it is a fraud to conceal from the employer. (*k*) And where the builder and the architect have conspired together to give false certificates, a defence by the employer to an action by an assignee of the amount due to the builder, that he had since the assignment discovered that the agreement had been obtained by the fraud and collusion of the builder, will be a good answer to such an action, and there is no obligation on the employer to give notice to the assignee of the discovery until the agreement is sought to be enforced. (*l*)

So where contractors agreed with a company to do certain work, for a sum of money payable by instalments on certificates by the company's engineer, who was *named* in the contract; and, shortly afterwards, the engineer agreed with the contractors to do the work for a sum of money payable to him by instalments when the contractors received their instalments from the company; it was held that the agreement between the engineer and the contractors was a fraud, which entitled the company to have their contract rescinded, and to receive back the money which they had paid; any surreptitious dealing between one principal and the agent of the other principal being a fraud on such other principal cognisable by the Court; and the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him. (*m*)

Except in case of fraud.

Remedy of building owner.

(14) RIGHT OF PERSON ADVANCING MONEY ON GUARANTEE.

Where, under a building agreement, there is a stipulation that the contract price for the houses is not to be payable to the builder until the architect shall have certified that all the work has been done according to the contract, it has been pointed out that, upon the completion of the buildings, there would be a debt due to the builder, but not payable until the architect had certified the fact of completion. And if the builder, therefore, simply assigns his rights to a third person, the latter, of course, would be architect being in the position of an arbitrator. See *per* A. L. Smith, M.R., in *Chambers v. Goldthorpe* (1901), 1 Q. B. 637, *ante*, p. 84.

Suing for payment on completion of houses, although architect's certificate is a condition precedent.

(*k*) *Panama, etc., Telegraph Co. v. India Rubber, etc., Co.*, L. R. 10 Ch. 515. See cases cited, pp. 85, 102.

(*l*) *Wakefield, etc., Banking Co. v. Normanton L. Bd.*, 44 L. T. 697.

(*m*) *Panama, etc., Telegraph Co. v. India Rubber, etc., Co.*, *supra*. See *South-Eastern Ry. v. Waiton*, 2 F. & F. 457.

entitled to no more than his assignor. But where the employer signed and handed to a third person, advancing money to the builder, the following document, "In consideration of your advance and Mr. J.'s (the builder) authority of this date, I promise to pay you the sum of £110 on the completion of six houses in accordance with a contract dated the 28th of April, 1876, between myself and Mr. J.;" and, in an action upon the employer's guarantee, the jury found that the houses were completed according to the contract before the commencement of the action; the House of Lords held that the finding of the jury was conclusive, and that the surveyor's certificate was not a condition precedent to the payment of the £110 to the plaintiff under the guarantee; as, if the certificate had been given, it could not have made the houses more complete than they were in fact, and the fact that it was withheld does not make them less so. (*n*)

Fraud.

The right of an assignee of an amount due to a builder on a building contract, which it is alleged has been obtained by fraud and collusion, has just been referred to. (*o*)

(*n*) *Lewis v. Hoare*, 44 L. T. 66. See *per* Lord Watson. See *post*, p. 127, as to assignees under building contracts.

(*o*) *Wakefield, etc., Banking Co. v. Normanton L. Bd.*, 44 L. T. 697, *supra*, p. 107.

CHAPTER IX.

OF PERFORMANCE OF THE WORK AND PAYMENT AND HEREIN OF ASSIGNMENTS OF BUILDING CONTRACTS.

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SECT. I.—PERFORMANCE OF THE WORK AND PAYMENT.

(1) GENERAL RULE AS TO PAYMENT.

WE have seen, in the last chapter, the effect of a provision making the architect's certificate a condition precedent to payment. light to
demand
payment.

In other cases, it is a general rule that, while a special contract to erect a house or other building remains open, i.e. unperformed, the builder cannot sue to recover any compensation for work and labour, nor can he maintain an action on the contract for what he has done until the whole is completed. (a) For a builder

(a) *Ellis v. Hamlen*, 3 Taunt. 52. See *Sinclair v. Bouves*, 9 B. & C. 92; *Selwyn v. Fogg*, 5 Mee. & W. 83; *Reul v. Hutchinson*, 3 Camp. 352; *Ferguson*

is not entitled to recover the value of the building materials employed by him in building a house for the defendant, under a claim for goods sold and delivered. (b) But where a builder engages to build a house, to be paid for his work and labour and the materials supplied, by measure and value, or according to the customary rate of valuation, he is entitled to demand payment from time to time as the work proceeds.

What constitutes "completion."

Everything which is indispensably necessary to complete the work must be carried out. The fact that the works are not specified in the agreement is no excuse for non-performance, (c) nor is it any excuse that they are impracticable, (d) or that they accord with the plans if they are otherwise incomplete. (e)

Defects appearing after completion.

A clause is frequently inserted in a building contract to the effect that the builder shall make good any defects which come to light within a certain period after the final certificate. It seems that the word "defects" in such a clause relates only to defects due to the default of the contractor. In a case which was heard at the Cape, (f) where a building contract contained a clause that "the contractor must make good at his own cost all omissions and defects that may appear or arise subsequent to the issuing of the final certificate of completion;" it was held by the Supreme Court of the Cape of Good Hope that this clause referred only to omissions and defects due to the default of the contractor, and was not tantamount to a maintaining and repairing clause.

"Defects" defined.

"Defects would be found to be confined to such defects as arose from the contractor's own default; for instance, such as would arise from improper or defective construction, or from the use of improper material contrary to the terms of the contract. He would not under such a clause be bound to restore if the premises were destroyed by some outside cause, nor would he be answerable for a defect inherent in the project itself, or for the insufficiency of the material if it complied with the specifications." (g)

v. *Carrington*, 3 Car. & P. 457; *Rees v. Lines*, 8 Car. & P. 126. See *post*, p. 190, for the rule applicable when the original contract is excluded by additions. See *Terry v. Duntze*, 2 H. Bl. 389, as to a covenant to build, and a covenant to pay being held to be independent.

(b) *Cotterell v. Apsey*, 6 Taunt. 322. See *Clark v. Bulmer*, 11 M. & W. 243; *Atkinson v. Bell*, 8 B. & C. 277, 283. As to an altered building agreement and suing on a *quantum meruit*, see *Pattinson v. Luckley*, L. R. 10 Ex. 330.

(c) *Williams v. Fitzmaurice*, 3 H. & N. 844.

(d) *Hydraulic Engineering Co. v. Spencer*, 2 T. L. R. 554.

(e) *Ib.* See also *Gillespie v. Howden*, 22 Sc. L. R. 527.

(f) *Roux v. Colonial Government* (1901), 18 S. C. (Cape of Good Hope) Rep. 143.

(g) *Per Buchanan, J.*, at pp. 147, 148.

(2) DEDUCTIONS FROM CONTRACT PRICE.

By agreement contained in the original contract, the right may be given in certain events, or in case of deviations and alterations, to reduce the debt or claim arising under it by set-off. And where, subsequently to a building contract, the employer agreed to supply parts of the materials, it was held that he was entitled to deduct from the contract price the value of materials so supplied. (*h*) So, where the employer had done part of the work himself, it was held that the contract price must be diminished by the value of that portion of the work. (*i*)

Deduction for materials supplied by employer.

Deduction for work done by employer.

(3) ANTICIPATORY BREACH OF CONTRACT.

There are numerous cases, of which the best known is perhaps the case of *Hochster v. De la Tour*, (*j*) laying down the rule as to anticipatory breach of contract. That rule seems to be that, where a party to a contract has made statements before the time for performance has arrived importing a refusal to perform or be bound by the contract, the other party, if he chooses, may elect to act upon such statements as a renunciation of the entire contract, and may thereupon treat it as a breach of the contract and bring his action. (*k*) On the other hand, the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as for his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance, which would justify him in declining to complete it. (*l*)

The case of *Johnstone v. Milling* (*m*) arose on a covenant by a lessor in a lease to rebuild the demised premises at a future date. The point was not necessary for decision, but all the members of the

Covenant by lessor to rebuild at some future time.

(*h*) *Newton v. Foster*, 12 M. & W. 772; *Allinson v. Davies*, Peake's Add. Cas. 82; *Grainger v. Raybould*, 9 C. & P. 229. See *infra*, p. 118, as to set-off.

(*i*) *Turner v. Dwyer*, 2 M. & G. 241. See *Pardoe v. Webb*, Car. & M. 531; *Bamford v. Harris*, 1 Stark. 343.

(*j*) 2 E. & B. 678.

(*k*) *Johnstone v. Milling*, 16 Q. B. D. 460.

(*l*) *Frost v. Knight*, L. R. 7 Ex. 111.

(*m*) *Supra*.

Court of Appeal expressed a strong opinion that in such a case, where the covenant in question was a particular covenant in a lease, not going to the whole consideration, and an actual breach whereof at the time fixed for performance would not entitle the tenant to throw up his lease, ⁽ⁿ⁾ an anticipatory breach could not entitle him to do so, and that he could not rescind part of the contract.

There must be intention not to carry out contract.

A claim for wrongful repudiation of a contract can only succeed where the repudiating party's language amounts to a declaration of intention not to carry out the contract, or is such that the other party is justified in inferring from it such intention; ^(o) and the language must be construed by the light of the contract and the circumstances of the case to see whether there is any such renunciation.

The true principle to be deduced from all the cases has been said to be that one must ascertain whether the conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions. ^(p)

(4) PERFORMANCE REFUSED OR PREVENTED.

The liability for the non-performance of a contract to build will fall upon the party who was in default and was the cause of the contract not being carried into effect. ^(q)

Refusal of one party to perform building contract.

Wherever one of the parties to a contract has, in an unqualified manner, refused to perform his side of the contract, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue, as on a *quantum meruit*, for anything which he had done under it previously to the rescission. ^(r) The refusal must be unqualified: in *Lines v. Rees*, ^(s) the action was *assumpsit*, on a contract to build a house for a specified sum, with a count for work and labour and materials. It appeared that the house was not yet completed, but that a good deal of extra work had been

⁽ⁿ⁾ *Surplice v. Farnsworth*, 7 M. & G. 576.

^(o) *Johnstone v. Milling*, 16 Q. B. D. 460, *supra*; *Société Générale de Paris v. Milders*, 49 L. T. 55.

^(p) *Rhymney, etc., Ry. Co. v. Brecon, etc., Ry. Co.*, 69 L. J. Ch. 813.

^(q) *Pontifex v. Wilkinson*, 1 C. B. 75.

^(r) See notes to *Cutter v. Powell*, 2 Sm. L. C. (11th ed.) 9, *et seq.*; *Withers v. Reynolds*, 2 B. & Ad. 882; *Planché v. Colburn*, 8 Bing. 14; *Franklin v. Miller*, 4 A. & E. 599. See *Société Générale de Paris v. Milders*, 49 L. T. 55.

^(s) Tried before Coleridge, J., at the Monmouthshire Summer Assizes, 1837, cited in notes to *Cutter v. Powell*, *supra*.

done by the defendant's order; that the plaintiff had called on him to pay for all that had been done, and that he had replied "that he would not—perhaps never." On this evidence the plaintiff's counsel submitted that he was entitled to recover on a *quantum meruit* for the extra work, and also to treat the special contract as rescinded. Coleridge, J., admitted that this would have been so, had the refusal to pay been absolute and unqualified; but thought that, in this case, the refusal to pay must be construed with reference to the demand, which was made, so far as the work done under the contract was concerned, too soon. He therefore considered the plaintiff entitled to recover for the extras only. (t)

The same consequence follows, where a party has incapacitated himself from performing his side of the contract, as if he had absolutely refused to do so. (u)

Incapacity equivalent to refusal.

It is a rule of law, which was established and well understood 200 years ago, and is laid down in Com. Dig., (w) that "the performance of a condition shall be excused by the obstruction of the obligee; as if a condition be to build a house, and he, or another by his order, hinders his coming upon the land, or says that it shall not be built, or interrupts the performance." If, after part performance of the work, the completion be refused or prevented by the employer, the builder may insist upon his rights under the contract, or claim damages without completion, and he will be entitled to recover what he has lost by the act of the defendant. (x)

Completion refused or prevented by employer.

A builder contracted to pull down fifteen old houses and erect twelve new buildings on the site, the work to be completed within six months of the date of the contract. He consented to a delay of two weeks from the date of the contract in obtaining possession

Failure to give possession.

(t) This case must not, however, be regarded as an authority for the proposition that in the case of an ordinary building contract being unfulfilled by the builder, he can always sue for extras as on a *quantum meruit*. It is conceived that if extras are ordered in accordance with the terms of a contract and certified for by the architect, their due completion is necessary for the due completion of the contract. As to suing on a *quantum meruit* in a case of part performance, see *Sumpter v. Hedges* (1898), 1 Q. B. 673, *post*, p. 121. See also as to the right of a builder to sue for work done outside the original contract, *Buxton v. Cornish*, 1 D. & L. 585, and other cases cited at p. 187, *post*. See also as to rescission on ground of absolute refusal, *Cort v. The Ambergate Ry. Co.*, 17 Q. B. 127; *Reid v. Hoskins*, 4 E. & B. 979; *Burtholomew v. Markwick*, 15 C. B. N. S. 711.

(u) *Robson v. Drummond*, 2 B. & Ad. 303; *Planché v. Colburn*, 8 Bing. 14.

(w) Com. Dig. Condition (L. 6), where authorities are collected.

(x) *Planché v. Colburn*, 8 Bing. 14; *Lawson v. Wallasey L. Bd.*, 52 L. J. Q. B. 302, and in Court of first instance, 11 Q. B. D. 229. See *Arterial Drainage Co. v. Rathangan Drainage Bd.*, 6 L. R. (Ir.) 515, as to right to sue as for *quantum meruit*, and see *Mackay v. Dick*, 6 App. Cas. 251. As to measure of damages, see *infra*, p. 114.

of the site. The building owner did not give possession at the expiration of that period, but subsequently gave it in parts, the last portion not being handed over until five months from the date of the contract. It was held that a term must be implied in the contract that possession of the whole site should be given forthwith, but this being waived by the consent of the builder to a fortnight's delay was altered to a reasonable time; that possession was not given within a reasonable time, and that the builder was entitled to recover damages for loss sustained in consequence of the breach. (*y*)

Forfeiture
not the only
remedy for
breach of
building
agreement.

Where a building agreement provided by one of its clauses that, in default by the lessee in completing within the stipulated time, the whole benefit of the agreement and all the materials and buildings on the premises should be forfeited to the lessor, and by another clause that the lessor should be entitled to re-enter and take possession of the premises, with all buildings and materials thereon, without making to the lessee any compensation in respect thereof, it was held upon such default being made, re-entry having taken place accordingly, that the lessor was not restricted to that remedy, but that an action for damages, to be measured by the pecuniary loss sustained, was also maintainable for breach of the agreement. (*z*)

The builder, if prevented by some act of the employer, will not be held liable for any penalties, (*a*) although he has a cause of action against the employer for any damages he may have sustained. (*b*) The ordering of extra works may amount to a waiver of a stipulation to pay damages for delay. (*c*)

(5) MEASURE OF DAMAGES WHERE CONTRACT NOT COMPLETED.

(*a*) *Where Performance prevented by Employer.*—The measure of damages, where performance is prevented by the employer, is the difference between what the performance would have cost the

(*y*) *Freeman & Son v. Hensler*, 64 J. P. 260. See also *Drew-Bear v. St. Pancras Guardians*, Appendix, p. 681.

(*z*) *Marshall v. Mackintosh*, 78 L. T. 750.

(*a*) *Holme v. Guppy*, 3 M. & W. 387. See this case, *post*, p. 149; *Russell v. Bandeira*, 13 C. B. N. S. 149. Cf. *Legge v. Harlock*, 12 Q. B. 1015; *Thornhill v. Neats*, 8 C. B. N. S. 831; *Dodd v. Churton* (1897), 1 Q. B. 562. See Chap. XI., *post*, p. 140, as to the right of the employer to enforce penalties where he causes the delay.

(*b*) *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310; *Lawson v. Wallasey L. Bd.*, *supra*; *Bush v. Trustees, etc., of Whitehaven*, 52 J. P. 392; *Peters v. Opic*, 1 Vent. 177; 2 Saund. 350; *Collins v. Price*, 5 Bing. 132; *Ferry v. Williams*, 8 Taunt. 70, and cases *supra*.

(*c*) *Dodd v. Churton* (1897), 1 Q. B. 562, and p. 141, *post*.

builder, and the price which the employer agreed to pay. A fair deduction must be made from the contract price in respect of the value of materials which have never been supplied, and wages which have never been paid. (*d*) In the case of unreasonable delay on the part of the employer in doing certain acts, the proper measure of damages will be the loss which the builder has unavoidably sustained in consequence of such unreasonable delay. (*e*)

If a question is raised by the defendant in an action for work done and materials supplied in respect of certain dwelling-houses, whether he was really the owner and person interested in the houses, the plaintiff may call other tradesmen as witnesses, to prove that the defendant had personally given orders to them to do work and supply materials in respect of the same houses. (*f*)

Evidence where defendant disputes ownership.

(*h*) *Where the Builder fails in Completion.*—If the builder, after part performance, have himself refused or failed to complete the contract, without any default of the employer, the latter may be entitled to treat the contract as rescinded, and maintain an action for damages; but, in general, the contract will not be specifically enforced. (*g*) And if a builder enter into a contract to expend a certain sum of money on land, and, after spending part of it, decline to perform the contract, he has no lien on the land for the money which he has expended. (*h*)

Where a builder has been employed to erect or repair a building, and after the lapse of some time, owing to his negligence in carrying out the work, damage is occasioned to the property of the building owner, the builder may be held liable. In a Scots case, (*i*) the stock in a shop having been injured by an overflow of water from a house above, the proprietor of the house, who had been found liable for the damage caused, sued a plumber, who had been employed by him to alter and repair the pipes in the house four years before the overflow, for repayment of the sum of damages and expenses paid by him in respect that the overflow had

Liability of builder for consequential damages.

(*d*) *Musarten v. Mayor, etc., of Brookelyre*, 7 Hill, N. Y. R. 61; *Addison on Contracts* (10th ed.), p. 846. See also *Drew-Bear v. St. Pancras Guardians*, Appenlix, p. 681.

(*e*) *Lawson v. Wallasey L. Bd.*, 52 L. J. Q. B. 302, and in Court of first instance, 11 Q. B. D. 229; *Bush v. Trustees, etc., of Whitehaven*, 52 J. P. 392.

(*f*) *Woodward v. Buchanan*, L. R. 5 Q. B. 235.

(*g*) See Chap. XVI., "Specific Performance." See *Strutt v. Farlar*, 16 M. & W. 249, as to the measure of damages from the breach of the defendant's promise to build a house. See also *Steam Herring Fleet v. Richards*, 17 T. L. R. 731; and as to remoteness of damages, see *Watson v. Gray* (1900), 16 T. L. R. 238.

(*h*) *Wallis v. Smith*, 21 Ch. D. 243.

(*i*) *McIntyre v. Gallacher* (1883), 4 Rett. 64.

been occasioned through his insufficient and defective plumber work. It was held, in the Court of Session, that it having been clearly proved that the cause of the overflow was an insecurely closed pipe, the plumber was, notwithstanding the lapse of time, liable for the expense to which his employer had been put.

Exact terms
of the con-
tract to be
considered.

Regard must be had, however, to the exact terms of the building or other contract under which a builder is employed, in order to see how far he is to be held liable for injuries which may be caused by defective work. Where, for instance, a contract for the installation of electric light in a building to be used for the purposes of public baths and wash-houses provided (*inter alia*) that "The whole of the work is to be carried out in accordance with the existing rules as framed by the Phoenix Fire Office . . ." Rule 5 of these rules provided that "Where a system of metal tubes is employed, the metal tubes should be earthed, except in those cases where earthing would not be desirable." A system of metal tubes was employed in the work, and, in consequence of such tubes not being earthed, a bather received an electric shock which caused his death. The local authority, which owned the baths, paid damages in respect of his death. In arbitration proceedings, in which the local authority sought to recover the sum so paid by them from the contractors, the arbitrator found that earthing the tubes would not have been desirable so far as risk of fire was concerned, but would, in fact, have been desirable so far as risk of accident to bathers was concerned. It was held, upon the hearing of a special case stated by the arbitrator, that inasmuch as the insurance company's rules were framed for the prevention of fire, and earthing was not desirable for that purpose, there had been no breach of contract, and that, therefore, the contractors were not liable. (*k*)

(6) NEGLIGENT AND DEFECTIVE CONSTRUCTION.

Through
negligence
or incom-
petence.

(*a*) *Generally*.—If a building is so negligently constructed as to be dangerous and unfit for use, the employer may require the builder to take down the structure and rebuild it; and if the builder neglect so to do, and refuse to fulfil his part of the contract, the employer may give him notice to remove his materials from off the land, and may resist payment of any portion of the price of the work. If he retain the materials, and make use of them, he will be bound to pay their fair value; but if the materials

(*k*) *Fulham B. C. v. National Electric, etc., Co.* (1906), 70 J. P. 55.

are altogether useless, or the employer has suffered from the breach of contract on the part of the builder more damage and injury than they are worth, he is not bound to pay anything. (l) Thus, where the front of a house was erected by a builder so much out of the perpendicular that it was in danger of falling, and it was necessary to take it down, the builder could not recover for such defective work. (n)

Furnsworth v. Garrard was followed in the American case of *Failure to lay foundations.* *Gillis v. Cobe*, (n) where an action was brought for work done and materials furnished in the construction of a building, which the plaintiff had contracted to build, but failed to construct to the satisfaction of the architect, whose approval was required. The contract required the plaintiff to ram the cinder filling on which the concrete floor of the building was laid. When certain heavy tanks, for which the building had been designed, were put in place, there was so great a sinking of the floor that the damage caused thereby was greater than the value of the work and materials furnished by the plaintiff. The cause of the sinking of the floor was not shown, nor whether it was due to insufficient ramming of the cinder filling, or to the nature of the soil. It was held that in order to recover the plaintiff must show that the building as it existed had a market value, and added to the value of the defendant's land; that the burden was not upon the defendant to show that the sinking of the floor was due to the failure of the plaintiff to perform his contract; and that the plaintiff could not recover the value of his work and materials diminished by such damages as the defendant could prove in recoupment.

Whenever anything is done under a special contract, but not in conformity thereto, the defendant may reduce the damages by showing that the work was improperly done, and may entitle himself to a verdict by showing that it was wholly inadequate to

Work under
a special
contract.

(l) *Per Tindal, C.J., Hill v. Featherstonhaugh*, 5 M. & P. 541, 544, 548. See Pothier, *Louage d'Ouvrage*, No. 431. See *The Times Fire Assurance Co. v. Hauke*, 23 L. J. Ex. 317, as to an insufficient and imperfect completion of a building contract.

(m) *Furnsworth v. Garrard*, 1 Camp. 38; *Deneau v. Daverall*, 3 Camp. 451. See *per* Lo Blanc, J., *Basten v. Butler*, 7 East, 481; *Duncan v. Blundell*, 3 Stark, 6; *Hayselden v. Staf*, 5 Ad. & E. 161. By the French law, the architect and the builder are liable during ten years for negligent construction. "Si l'édifice construit à prix fait péricule en tout ou en partie par le vice de la construction, même par le vice du sol, les architectes et entrepreneurs en sont responsables pendant dix ans." Code Civil, Liv. III. tit. viii. 1792. As to a similar article in the Civil Code of Lower Canada, see *Wardle v. Bethune*, L. R. 4 P. C. 33 (adopting the decision of *Brown v. Lawrie*, 1 Low. Can. Rep. 343; 5 Low. Can. Rep. 65).

(n) (1899) 177 Mass. 584.

answer the purpose intended. (*o*) In such a case the plaintiff, suing on the contract, and alternatively on a *quantum meruit*, to recover the price of certain specified work, if he do not properly carry out the contract, if he can entitle himself to recover at all, can only recover the real value to the defendant of the work done and the materials supplied. (*p*)

Set-off under
Judicature
Acts.

(*b*) *Right of Set-off*.—By the Judicature Acts, (*q*) in the case of pecuniary claims, the power of set-off (using that expression in its largest or popular, and not in its narrower or technical, sense) is no longer, as was formerly the case, limited to debts. Claims for unliquidated damages may be set up against debts, and debts against damages, and damages against damages. And a cross-claim by a defendant may not merely be used by way of set-off, as an answer to the plaintiff's claim; a defendant may, by way of counterclaim, unless the Court or judge refuse permission, claim in the original action any relief against the plaintiff (and subject to certain restrictions against any other persons) (*r*) which he could formerly have sought by a cross-action: so that there may be a judgment in his favour for a sum of money, if the balance of pecuniary claim prove to be in his favour; or any other remedy or relief may be adjudged to him to which he may show himself to be entitled.

Practical
value of
distinction
between
set-off and
counterclaim

But the distinctions which obtained before the Judicature Acts as to what kind of claim was capable of being 'set off,' technically speaking, so as to afford a defence to the plaintiff's claim, is still of great practical importance upon the question of costs. For a "set-off," properly so called, is pleadable as matter of defence to the plaintiff's action, and defeats it altogether. A cross-claim which is not strictly a set-off, but an independent

(*o*) *Furnsworth v. Garrard*, 1 Camp. 38, varying the rule in *Broom v. Davis*, cited 7 East. 480, *in notâ*; *Basten v. Butter*, 7 East, 479; *Grounsell v. Lamb*, 1 M. & W. 352; *Bracey v. Carter*, 12 A. & E. 373; *Chapel v. Hickes*, 2 C. & M. 214. See also as to quantum of reduction, *Thornton v. Place*, 1 M. & Rob. 218; *Cutler v. Close*, 5 C. & P. 337; *Street v. Blay*, 2 B. & Ad. 456; *Baillie v. Kell*, 6 Scott, 379; *Davis v. Hedges*, L. R. 6 Q. B. 687; and cf. rule of State of New York as to recoupment, in notes to American edition, Sm. L. C. by Hare and Wallace; and as to *recouper* in our Courts, *Jeely v. Grew*, 6 N. & M. 469 n. *Jebson v. E. and W. India Dock Co.*, L. R. 10 C. P. 300.

(*p*) *Stegmann v. O'Connor* (1899), 80 L. T. 234, following *Chapel v. Hickes*, 2 C. & M. 214.

(*q*) R. S. C. 1883, Order 19, r. 3; Order 21, r. 17, and s. 24 of the Judicature Act of 1873, sub-ss. 1, 2, 6, 7.

(*r*) S. 24, sub-s. 3. R. S. C. 1883, Order 16, rr. 48-55; Order 19, r. 3; Order 21, r. 12. As to this section, see the remarks of Mellish, L.J., in *Treleven v. Bray*, L. R. 2 Ch. D. 740; *Padwick v. Scott*, L. R. 2 Ch. D. 740; and see *Schneider v. Butt*, 8 Q. B. D. 701.

claim, enforceable only by way of counterclaim, may defeat the plaintiff's claim in a sense, but not as effectively as if it had been a set-off properly so called. A simple illustration must suffice in this place; the reader being referred to "The Annual Practice, or Bullen on Leake on Pleading," (s) for full information. A. sues B. for £100, for a debt due from B. to A. A. also owes B. £100 on another account. B. may "set-off" A.'s debt to him, against his debt to A., and in this case B. will get all the costs of the action. But if A. sues B. for a liquidated debt of £100, and all B. has to set against it is a claim for unliquidated damages, and he counterclaims for these damages and recovers £100 on his counterclaim against A.; although A. will not recover anything of his debt, yet he will recover against B. the costs he has been put to in proving his debt, against which B. will recover his costs of proving his damages. For this reason if A. is a perfectly solvent person, and B.'s claim against him is a counterclaim, as distinguished from a set-off, it may frequently be good policy for B. to pay A.'s demand, and then pursue his own remedy against A. by action.

The counterclaim need not be a joint claim against the defendants to it, but may be for separate and distinct causes of action, as, where the claim against the defendant was for damages in preventing the plaintiff completing certain work, the defendant by counterclaim pleaded breach of contract against the plaintiff and damages, and that one R. (whom he served with notice) had bound himself to be answerable for the plaintiff's due execution of the work. (t)

Who may be defendants to counterclaim.

(c) *Cross-action*.—Where an action is brought for damages for the non-performance and improper performance of certain work, it is no defence that the defendant had already sued the plaintiff for the price of the work in dispute, and that the plaintiff had settled the action by paying the whole amount then sued for. For although the plaintiff might have used the causes of action for which he sued in reduction of the claim in the former action, yet he is not bound to do so, but may maintain a separate action for them. (u)

Option to bring cross-action or use defective performance in reduction of claim.

(s) 6th ed. (1905), by Cyril Dodd, K.C., and T. Willes Chitty, p. 534, *et seq.*

(t) *Turner v. Hednesford Gas Co.*, 3 Ex. D. 145. See R. S. C. 1883, Order 20, r. 7; Order 21, r. 12, and *Central African Co. v. Grove*, 27 W. R. 933.

(u) *Davis v. Holges*, L. R. 6 Q. B. 687; *Mondel v. Steel*, 8 M. & W. 858; *Riggs v. Burbidge*, 15 M. & W. 599; and see *Basten v. Butler*, 7 East, 479; *King v. Boston*, 7 East, 481 n.; *Fisher v. Samuda*, 1 Camp. 190; and see *Marriott v. Hampton*, 2 Smith's Leading Cases (11th ed. 1903), 421, and cases thereunder. See *Tye v. Gwynne*, 2 Camp. 347, as to an action upon a bill of exchange given by way of price of the work.

Evidence of damage not bearing upon the value of the work inadmissible.

Admissions by employer in action by builder.

But when the employer elects to give the non-performance or defective performance in evidence in reduction of the price in an action by the builder, no evidence of any other damage caused by such breach of contract, not directly bearing upon the question of the value of the work, is admissible; and such special damage must, subject to the provisions of the Judicature Act, (v) be sought in a distinct claim. (w) If, on the other hand, the employer pay the contract price, and afterwards maintain a separate action for the damages, it seems that the effect of his admissions in the action by the builder for the price is confined to the action or proceeding in which they are made; they do not operate by estoppel, nor can they be used as evidence in other actions. So the statements in the pleadings in a cause, though binding upon the party for the purpose of the cause, unless put in issue and decided, are not binding in other proceedings. (x)

(7) PART PERFORMANCE.

What acceptance of part-performed work necessary to bind employer.

(a) *Generally*.—Although it is the general rule that a person, retaining the benefit of a part-performed consideration, may render himself liable upon a new contract to pay for it, as in the case of his accepting an incomplete delivery of goods under a contract of sale; (y) yet the circumstances in building contracts are generally such that there is no option of returning or rejecting the consideration performed, in which case no promise can be implied to pay for it. And if a builder, after expending a certain sum, decline to perform the rest of the contract, he has no lien on the land for the money which he has expended. (z)

Not sufficient that buildings remain on the land.

In the case of a building contract, the mere fact that the part performance has been beneficial, as that the buildings remain upon the land, is not enough to render the employer liable, and is not such an acceptance as imports a new promise to pay for the work; it must be shown that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise

(v) See *ante*, p. 118.

(w) *Allen v. Cameron*, 1 C. & M. 832; *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 M. & W. 598. As to damages by improper repairs, see *Wilson v. General Iron Screw Co.*, 47 L. J. Q. B. 239.

(x) *Carter v. James*, 13 M. & W. 713; *per Willes, J.*, in *Howlett v. Tarte*, 10 C. B. N. S. 826; but see *per Cur.* in *Boileau v. Rutlin*, 2 Ex. 681, and *Priestman v. Thomas*, 9 P. D. 70, 210. See *Turner v. Tepper*, 46 L. J. Ch. 703.

(y) *Champion v. Short*, 1 Camp. 53; Sale of Goods Act, 1893.

(z) *Wallis v. Smith*, 21 Ch. D. 243.

to pay for the work done, notwithstanding the non-performance of the special contract, and some positive acquiescence in the incomplete or existing state of the building is necessary to render him liable to pay according to measure and value. (a)

So where the plaintiff, a builder, who had contracted to erect certain buildings on the defendant's land for a lump sum, abandoned the contract after he had done part of the work, and the defendant thereupon completed the buildings; it was held that the plaintiff could not recover from the defendant in respect of the work which he had done as upon a *quantum meruit*, there being no evidence of any fresh contract to pay for the same. (b)

Abandonment by builder.

"I think the case is really concluded by the finding of the learned judge to the effect that the plaintiff had abandoned the contract. . . . The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for the inference of a new contract." (c)

But where the contract contains a "vesting clause," and the contractor fails to complete, he cannot recover the materials, although the building owner does not complete the works himself or by another contractor. (d)

It is important to note that in *Sumpter v. Hedges* (c) reliance was placed upon the fact that the plaintiff had abandoned his contract. Where the builder has not abandoned, and, in addition to accepting the benefit of the work done by the builder under the contract, the employer does something which puts it out of the power of the builder to complete, it seems that the builder may recover as on a *quantum meruit*.

Where the employer puts it out of the power of the builder to complete.

In *Lysaght v. Pearson* (f) an action was brought to recover £240, the price of a corrugated iron roof, made and erected by the plaintiff for the defendant. The defendant entered into negotiations with the plaintiff for the supply of two corrugated iron roofs in January, 1877, and after some correspondence it was agreed that they should be supplied and erected for £320. The plaintiff

By completing the work himself.

(a) *Munro v. Butt*, 8 E. & B. 733; *Pattinson v. Luckley*, L. R. 10 Ex. 330; *Whittaker v. Dunn*, 3 T. L. R. 602. See *Ellis v. Hamlen*, 3 Taunt. 52; *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 118. See *Wallis v. Smith*, *supra*.

(b) *Sumpter v. Hedges* (1898), 1 Q. B. 673, following *Munro v. Butt*, 8 E. & B. 733, *supra*.

(c) *Ib.*, per Collins, L.J., at p. 676.

(d) *Hart v. Porthgwin Harbour Co., Ltd.* (1903), 1 Ch. 690. See an extract from the judgment in this case, p. 171, *post*.

(e) (1898) 1 Q. B. 673, *supra*.

(f) *Times*, March 3, 1879. This case is referred to and not doubted in the case of *Sumpter v. Hedges* (1898), 1 Q. B. 673, *supra*, at p. 675 in the L. R.

Where contract entire and another builder employed.

supplied and erected the larger of the two roofs, but refused to supply the second and smaller roof until the price of the larger had been paid to him. The defendant refused to pay the price of either roof until the whole of the work contracted for had been completed, and gave the plaintiff notice to proceed with the second roof. On his refusal the defendant employed another person to supply and erect it. The defence set up by the defendant was that the contract being entire and undivisible, the completion of the work was a condition precedent. Stephen, J., held plaintiff entitled to recover, subject to a deduction which was assessed by the jury, for damages for delay in erecting the small roof. The Court of Appeal held that as the contract was entire, the plaintiff would not have been entitled to sue if the defendant had done nothing to alter the position of the plaintiff, for the plaintiff had throughout been in the wrong, and was not ready and willing to perform his part of the contract. But the defendant had taken the matter into his own hands and had completed the second roof. He had not merely taken possession of the property; if he had only done that, he would not have been liable; but he had completed the second roof, so that it was impossible for the plaintiff to complete it. The plaintiff was therefore held entitled to sue on a *quantum meruit*, and the judgment of the Court below was affirmed.

Employment of another builder.

In a recent case (*g*) the contract was to move certain machinery into a laundry and leave it in "good working order." The plaintiff having, as he thought, completed the work, brought an action for the contract price. The defendants resisted the claim on the ground of non-completion, and the County Court judge non-suited the plaintiff. On appeal it was pointed out that after the plaintiff had left the work the defendants had called in local engineers to complete it, and they had written the plaintiff to this effect. This letter, although read in the County Court, had not been specifically relied on by the plaintiff in the County Court. It was held by the Divisional Court that the defendants, on their own admission, having put it out of the plaintiff's power to complete, he was entitled to sue as on a *quantum meruit*. In the result a new trial was ordered. (*h*)

Where a lessor contracted to pay his tenant, at a valuation, for

(*g*) *Townend v. Queen's Laundry* (unreported), heard by Ridley and Darling, JJ., in the Divisional Court on May 23, 1906.

(*h*) This note of the decision was made by the junior editor, who was engaged as counsel in the case. Counsel for the defendant has kindly read and approved this epitome of the decision.

certain erections, pursuant to a plan to be agreed upon, provided they were completed in two months; and no plan was agreed on, and, after the condition broken, the lessor encouraged the lessee to proceed with the work; it was held that the lessee might recover as for work and labour, on an implied promise arising out of so many of the facts as were applicable to the new agreement. (i)

(b) *Part Performance of Contract with a Corporation.*—While a new contract between the parties may sometimes be inferred, as in the cases above quoted, (k) so as to enable the builder to sue as on a *quantum meruit*, such an inference can only be drawn where the employer may contract otherwise than under seal. No such inference could be drawn in the case of a corporation, which only has power to contract under seal. (l)

(c) *Part Performance under Scots Law.*—In Scotland, where a building contractor fails to follow the plans agreed on, the general rule is that he is not entitled to the contract price, and that the proprietor has the option of calling upon him to remove the materials from his ground, or of retaining them subject to the builder's claim against him in *quantum lucratus est*; but when the deviations are not material, the proprietor may be ordained to pay the contract price, under deduction of the cost of bringing the building into conformity with the plan. (m)

(d) *Part Performance of a Divisible Contract.*—Where a contract is divisible, and is part performed, the contractor can apparently recover for what he has done. So in a Canadian case, (n) by a contract to remove spans from a wrecked bridge in a river, the contractors agreed "to remove both spans of the wrecked bridge and to put them ashore for the sum of \$25,000, we to be paid \$5000 as soon as one span is removed from the channel and another \$5000 as soon as one span is put ashore, and the balance as soon as the work is completed. . . . It being understood and agreed that we push the work with all reasonable dispatch, but if we fail to complete work this season we are to have the right to complete it next season." It was held that the contract was

(i) *Burn v. Miller*, 4 Taunt. 745. See Chap. VI., ante, p. 60, as to landlord allowing builder to spend money in error.

(k) *Lysaght v. Pearson*, supra, p. 121, and *Townend v. Queen's Laundry*, supra.

(l) See *Lamprell v. Billericay Union*, 3 Ex. 283, noted ante, p. 45.

(m) *Ramsay v. Brand* (1898), 25 F. 1212.

(n) *Collin's Bay Co. v. New York and Ottawa Ry. Co.* (1902), 32 Can. S. C. R. 216. For an example of an "indivisible contract," see *Lucas v. Borough of Drummoyne*, 16 N. S. W. R. 55.

divisible, and the contractors, having removed one span from the channel and put it ashore, were entitled to the two payments of \$5000 each, notwithstanding the whole work was not completed in the second season.

(c) *Failure to carry out Specific Repairs.*—In a case in the Privy Council, (o) where the plaintiffs contracted with the agent of an absent shipowner to effect certain specified repairs (all confined to damage by stranding), and instead of doing the work as stipulated alleged that they had, on the agent's authority, done the equivalent thereto or better, and in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them. It was held that, it appearing that the agent's authority to the plaintiffs' knowledge was limited to the said specified repairs, they could not recover on the contract, which was an entire one, and in its entirety had never been performed. It was also held that, the shipowner having taken the ship as repaired and sold it, did not thereby ratify the contract.

(f) *Rights of a Builder who has partly performed his Contract.*—It will be seen from the above cases that the builder who has partly performed and failed to complete his contract to build stands to lose the entire contract price. (p) But is he entitled to nothing? Assume that a house having been completed, say, to the roof, the builder throws up the job, does he forfeit all that he has expended in providing materials? It is easy to understand that he should forfeit what he has been paid for work and labour, but that he should actually lose materials which he has purchased, and be not compensated in any way for them, does not accord with justice. Strange to say, there appears to be no definite authority for the proposition that, in the circumstances above set out, the builder can recover the price of materials supplied. It is probable that the system of payment by instalments upon the architect's certificates is to a large extent responsible for this lack of authority. It is worthy of remark, however, that in *Sumpter v. Hedges*, (q) where the builder had definitely abandoned his contract, it was not disputed that he was entitled to be paid for materials supplied by him which were used by the employer in the completion of the work. (r) In any event, it is submitted that in the case of non-completion, from whatever cause, a builder is entitled to recover the fair value of

(o) *Forman & Co. v. Liddesdale* (1900), A. C. 190.

(p) See, for example, *Sumpter v. Hedges* (1898) 1 Q. B. 673, *supra*, p. 121.

(q) *Supra*.

(r) See statement of facts at p. 673 of the report in the L. R.

loose materials brought on to the ground by him and actually used by the employer for the completion of the work. (s)

Where, however, the contract contains a clause vesting the materials in the employer as they come on the land, it would seem that, inasmuch as such a vesting clause is in effect a security that the builder shall perform his contract, he will be precluded from recovering such materials where he has not completed. (t)

(g) *Where Completion prevented by Accident.*—When a builder contracts to do certain work in consideration of a fixed sum to be paid on completion, and the further performance is prevented by some accident or event that may excuse the non-completion (e.g. destruction by fire of the premises on which the work is to be done); yet, if there be no default of the employer, the builder has no claim for the part performed before the prevention occurred. (u)

Right to payment after part performance where completion of building prevented by accident.

But if, on the other hand, the contract be to erect certain buildings, and provide materials and workmanship, for which payment is to be made from time to time as performed or supplied, the claim for the part which is performed remains valid, although further performance may be prevented by accident, and the part already performed become useless. (w) And where a contractor was employed at continuous work upon the repairs to a building, which was accidentally destroyed by fire before the repairs were completed, he was entitled to charge for his work and materials rendered up to that time. (x)

(8) RESCISSION AFTER PART PERFORMANCE.

If a building contract be rescinded by a subsequent agreement, whilst it is in course of performance, and after it has been in part performed, or after some consideration has been paid or taken

Rescission by mutual consent.

(c) See *Stegman v. O'Connor* (1899), 80 L. T. 234.

(t) See *per* Farwell, J., in *Hart v. Porthgwin Harbour Co., Ltd.* (1903), 1 Ch. 690, at p. 695, 696, noted *post*, p. 172.

(u) *Appleby v. Myers*, L. R. 2 C. P. 651. See *post*, Chap. XV., as to impossibility of performance. As to performance being prevented by strikes, see *King v. Parker*, 34 L. T. 857; and see, as to completion prevented by accident, *Roberts v. Havelock*, 3 B. & Ad. 404; *Menstone v. Athawes*, 3 Burr. 1592; *Taylor v. Caldwell*, 3 B. & S. 825; *Cutter v. Powell*, 6 T. R. 320; *Jesse v. Roy*, 1 C. M. & R. 315; *Munro v. Butt*, 8 E. & B. 732; *Sinclair v. Bowles*, 9 B. & C. 92.

(w) See *Chandler v. Webster* (1904), 1 K. B. 493, and other cases cited, *post*, p. 195.

(x) *Menstone v. Athawes*, 3 Burr. 1592; *Tripp v. Armitage*, 4 M. & W. 699; *Gillett v. Mawman*, 1 Taunt. 137. As to the Roman Law with respect to the destruction of work by accident before payment, see Dig. Lib. 19, tit. 3, lex 59; Dig. Lib. 6, tit. 1, lex 39.

under it, any claim in respect of the part performance, or of what has been paid or received under it, must be referred to the agreement of rescission; and, in general, no such claim can be made, unless expressly or impliedly reserved upon the rescission. (*y*)

Voidable
agreement
rescinding
the contract.

So where a contract is rescinded by a subsequent agreement, although the latter agreement be voidable, if it is voluntarily acted upon by a party to it, with a knowledge of all the facts, he cannot avoid it when the result has turned out to his disadvantage. (*z*)

Subsequent
agreement
may only
alter original
building con-
tract in part.

The subsequent agreement may affect certain parts or provisions only of the former contract, expressly or impliedly, leaving the original contract in all other respects to stand; and, consequently, may have to be construed upon the basis of, and with reference to the original contract. (*a*) But, as will be seen in another chapter, (*b*) a subsequent agreement for additional work, which is so mixed up with the original contract to build, as to render it impossible to complete within the time appointed, will operate as a waiver and discharge of the original contract as regards the time of completion, so that no penalties can be claimed for delay.

(9) DEVIATIONS AND RIGHT TO PAYMENT.

Effect of,
upon
builder's
right to
payment.

A builder, under a contract to erect a house in accordance with plans and specifications for a certain sum, to be paid on the completion of the building, can recover the contract price, although there are certain immaterial omissions or deviations from the contract, if the building has been substantially completed; (*c*) but the defendant will be entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract. A building contract may be broken in the letter with trifling damage to the employer; and, if performance in every minute particular were made a condition precedent to the

(*y*) *James v. Cotton*, 7 Bing. 266; and see *post*, Chap. X., p. 132. See *De Bernardy v. Harding*, 8 Ex. 822, as to when it is a question for the jury whether the original contract has been rescinded. See *Marsden v. Sumbell*, 28 W. R. 952, and *post*, p. 153 *n* (*k*), as to a mistaken claim to have a building contract rescinded.

(*z*) *Ormes v. Beadel*, 2 De G. F. & J. 333.

(*a*) *Carr v. Wallachian Petroleum Co.*, L. R. 1 C. P. 636. See *Legge v. Harlock*, 12 Q. B. 1015; *Jones v. St. John's College*, L. R. 6 Q. B. 115; and see *Hunt v. South-Eastern Ry.*, 45 L. J. C. P. 87.

(*b*) *Thornhill v. Neats*, 8 C. B. N. S. 831; see *post*, Chap. XI., p. 140, and Chap. XIV.

(*c*) *Lucas v. Godwin*, 3 Bing. N. C. 737. See *post*, p. 138. See *post*, Chap. XIV., under "Extras," as to when the original contract and estimate are excluded by deviations.

builder's right to sue, "a trilling injury to the one party might occasion the loss of all remuneration to the other for a long and laborious service." (*d*)

And, in an action for the contract price, the defence to which is that the work did not answer the purpose required, if the work is substantial in the main, though not quite so complete as it might be under the contract, and can be made good at a reasonable rate, the plaintiff is entitled to recover, deducting such sum as would enable the defendant to do what was required. (*e*) But where it appears from the whole tenor of the agreement that the parties intended, the one to insist upon, and the other to submit to, conditions, however unreasonable and oppressive, the Court will in such case give effect to them. (*f*)

Work substantial in the main.

SECT. II.—ASSIGNMENT OF BUILDING CONTRACTS. (*g*)

(*a*) *Generally*.—An equitable assignment of a chose in action may be made by any words or acts showing a clear intention to assign; a deed or writing is not required for the purpose. (*h*) Hence, in equity, an order given by a builder to his creditor upon the employer, having money due to the builder in his hands, to pay the creditor out of those funds, is a binding equitable assignment of so much of the funds; and, if communicated to the employer, will prevail against a subsequent bankruptcy of the builder, though intervening while the letter containing the order is on its way to the employer; (*i*) and in all other cases,

Equitable assignment of moneys due.

d Tindal, C.J., *Stevens v. Curling*, 3 Sc. 755. See the remarks of James, L.J., in *Wilkinson v. Clements*, L. R. 8 Ch., at p. 106.

e *Cutler v. Close*, 5 C. & P. 337; *Chapel v. Hickes*, 2 C. & M. 214; *Thornton v. Place*, 1 M. & Rob. 218.

(*f*) *Stadhard or Stannard v. Lee*, 3 B. & S. 364. See *ante*, p. 94.

(*g*) As to the right of an assignee, where the architect's certificate is made a condition precedent by the building contract, see *ante*, p. 107. As to advances to builder, see next chapter.

(*h*) Such an assignment will now be valid under the Judicature Act in all Courts, though not falling within s. 25, sub-s. 6. See *infra*, p. 128. As to equitable assignments, see *Row v. Dawson*, 1 Ves. Sen. 331; *Lett v. Morris*, 4 Sim. 607; *Malcolm v. Scott*, 3 Hare, 39; *Buck v. Robson*, L. R. 3 Q. B. D. 686; *Ex parte Hall, Re Whiting*, 10 Ch. D. 615; *Ex parte Brett, Re Irving*, 7 Ch. D. 419.

(*i*) *Ex parte South*, 3 Sw. 392, affirming 1 Mad. 53; *Row v. Dawson*, *supra*; *Lett v. Morris*, *supra*; *Burn v. Carvalho*, 4 My. & Cr. 690; *Collyer v. Fallon*, T. & R. 459; *Boyd v. Mangles*, 18 L. J. Ex. 273; *Dickinson v. Barrow*, 14 M. & W. 713. But see *Lord Braybrooke v. Meredith*, 13 Sim. 271; *Ex parte*

Fund to be specified.

such an order, if assented to by the employers, would even at law, before the Judicature Acts, have amounted to a binding appropriation. (*k*) It is essential, however, that the fund out of which the money is to be paid should be specified. (*l*) But an authority to an agent to receive payment from the employer and pay over the amount is not an assignment of the debt; it does not affect the employer, except by enabling him to discharge the debt by payment to the agent so authorised to receive it. (*m*) And, again, where a contractor gave his banker a letter directing the employer to pass the cheques which might become due to him "to his account with the bank," it was held that this was not an equitable assignment, but that it would have been if it had directed the cheques to be passed to the bank. (*n*)

Whether notice necessary.

Though notice may not be essential to perfect an assignment *inter partes*, it is necessary to complete the title of an equitable assignee, as against another assignee of the same matter; for as between two equitable assignees for valuable consideration, without notice of prior charges, he who gives notice first has the better title. (*o*) This, it seems, will operate so as to postpone even a trustee in bankruptcy to an assignee without notice of the bankruptcy. (*p*) And notice may be necessary in order to take the chose in action out of the order and disposition of the assignor in case he becomes bankrupt, and thus to prevent the order and disposition clause in the Bankruptcy Act from rendering the assignment ineffective.

(*b*) *Absolute Assignment under the Judicature Act.*—It is provided by the Judicature Act (*q*) that an absolute assignment by writing of any debt or legal chose in action, of which express notice (*r*) in

Flower, 4 D. & C. 449; *Ex parte Bell*, 17 L. J. Bk. 9; *Crowfoot v. Gurney*, 2 Mo. & Sc. 473; *Ex parte Steward*, 3 M. D. & D. 265.

(*k*) *Hutchinson v. Heyworth*, 9 A. & E. 375; *Walker v. Rostron*, 9 M. & W. 411; *Williams v. Everett*, 14 East, 582.

(*l*) *Percival v. Dunn*, 29 Ch. D. 128.

(*m*) *Rodick v. Gandell*, 12 Beav. 325, affirmed 3 Mac. & G. 754; 1 De G. M. & G. 763; *Phillips v. Prichard*, 1 Jur. N. S. 750; *Scott v. Porcher*, 3 Mer. 652.

(*n*) *Bell v. London and North-Western Ry. Co.*, 15 Beav. 458. But see *Riccard v. Prichard*, 1 K. & J. 277; *Brice v. Bannister*, 3 Q. B. D. 569; *Buck v. Robson*, 3 Q. B. D. 686; *Ex parte Hall, Re Whitting, supra*. As to the stamp on an order to pay moneys due under a contract to a third person, see *Diplock v. Hammond*, 2 Sm. & G. 141; *Crowfoot v. Gurney, supra*; *Buck v. Robson, supra*.

(*o*) *Dearle v. Hall*, 3 Russ. 1; *Ward v. Duncombe*, [1893] A. C. 369.

(*p*) *Palmer v. Locke*, 18 Ch. D. 381. *Baldwin's Bankruptcy* (9th ed.), p. 224.

(*q*) 36 & 37 Viet. c. 66, s. 25, sub-s. 6.

(*r*) It is not too late to give notice in writing after the death of the assignee; *Bateman v. Hunt* (1904), 2 K. B. 530.

writing shall have been given to the debtor, shall be effectual in law (subject to all equities which would have been entitled to priority previous to the Act), to pass the legal right to such debt or chose in action from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

(c) *What is an "Absolute Assignment."*—An order in writing to pay a sum, out of a debt to become due under a building contract, is not an absolute assignment under this section; and, therefore, the assignee cannot maintain an action in his own name under this section to recover payment. (s)

A mortgage of debts due to the mortgagor, made in the ordinary form, with a proviso for redemption and reassignment upon repayment to the mortgagor, is "an absolute assignment." The right to reassignment will in such a case be implied. (t) The assignment must not, however, be conditional.

So where a firm of builders delivered to the plaintiffs a document in the following terms: "*Re* Building Contract, South Lambeth Road.—In consideration of money advanced from time to time we hereby charge the sum of £1080, which will become due to us from J. R. on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." It was held that the repayment of the money advanced was an uncertain event, and that this made the assignment conditional. (u) "Where the Act applies it does not leave the original debtor in doubt as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. (w)

An assignment, not of the benefit of the whole contract assigned, but only of sufficient to secure repayment of a sum advanced, is not an "absolute assignment." (x) But where the assignment is of all moneys due or to become due, and all the rights of the mortgagor pass to the mortgagee, the assignment is absolute. (y)

(s) *Durham v. Robertson* 1898, 1 Q. B. 765, *per* Chitty, L.J., at p. 773. See also *Buck v. Robson*, 3 Q. B. D. 686, overruling *Ex parte Shellard*, L. R. 17 Eq. 109; *Ex parte Nichols, Re Jones*, 22 Ch. D. 782. See *Fisher v. Calvert*, W. N. 1879, p. 7.

(t) *Durham v. Robertson* 1898, 1 Q. B. 765.

(u) *Ib.*

(w) *Ib.*, *per* Chitty, L.J., at p. 773 in the L. R.

(x) *Mercantile Bank v. Evans* (1899), 2 Q. B. 613; *Jones v. Humphreys* (1902), 1 K. B. 10.

(y) *Hughes v. Pump House Hotel Co.* (1902), 2 K. B. 190.

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The whole instrument to be considered.

the test being—Does the whole instrument show an intention that it is to take effect by way of charge only? (z) Nor is it material to consider what was the consideration for the assignment, or whether the security is for a fixed or definite sum, or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee. (a)

(d) *Equitable Assignment*.—In order to the creation of a good equitable assignment, the fund out of which the money is to be paid must be specified. (b) And the assignment is valid against advances subsequently made by the employer to the builder to enable him to complete his contract; and payment to the builder after notice is bad. (c) But there must be an actual chose in action; thus, after an agreement between a landowner and a builder as to the erection of houses by the latter, he asked the landowner to advance him money to enable him to carry out his contract, and the landowner agreed to do so. The builder then purported to assign part of the money so agreed to be advanced; but it was held that the assignment was ineffectual. The promise by the landowner created no debt, there was no consideration for it, and no action would lie on his promise, and it could not therefore be assigned. (d)

Priority of trustee in bankruptcy over assignee after time for completion.

Where a builder, after the time for completion had expired, assigned to the plaintiff £200 of what should be coming to him under the building contract (which provided that the building should be finished by a certain day, and, if not, that the employer might engage another builder to complete it); and soon afterwards the builder executed a creditors' deed, and the trustee of this deed completed the building with his own money, and was repaid by the employers, and, allowing this repayment as proper, nothing remained due on the contract; it was held, upon the plaintiff filing his bill to enforce payment of the £200, that the payments by the employer to the trustee were proper, and that the plaintiff was not entitled. (e) The decision proceeded on the view that

(z) *Ib.* See *per* Mathew, L.J., at p. 193; and Cozens-Hardy, L.J., at p. 198.

(a) *Ib.*, *per* Cozens-Hardy, L.J., at pp. 197, 198. See also as to what amounts to an absolute assignment, *Brandt v. Dunlop Rubber Co.* (1905), A. C. 454.

(b) *Percival v. Dunn*, 29 Ch. D. 128, *supra*; *Ex parte Hall*, *Re Whitting*, 10 Ch. D. 615.

(c) *Brice v. Bannister*, 3 Q. B. D. 569, *supra*. As to assignee suing in his own name, see *Sanders, & Co. v. Peek*, 50 L. T. 630; 32 W. R. 462.

(d) *May v. Lane*, 64 L. J. Q. B. 236; *Western Wagon Co. v. West*, [1892] 1 Ch. 271.

(e) *Tooth v. Hallett*, L. R. 4 Ch. 242; and see *Myers v. United Guarantee and Light Assurance Co.*, 7 D. M. & G. 112; *Bristow v. Whitmore*, 9 H. L. C. 391.

the employer exercised his power of taking the work out of the contractor's hands. (*f*) If he does not exercise such power, and the trustee in the liquidation merely completes the original contract, the assignee's claim is good as against the trustee. (*g*)

It is to be regretted that the Bankruptcy Act, 1883, contains no definition of the words "trade or business," but a builder was a "trader" within the definition of the Act of 1869. It has been held that an assignment by a trader of the future receipts of his business is, as regards receipts accruing after the commencement of the bankruptcy, inoperative as against the title of the trustee. (*h*)

(*e*) *Assignee's Right of Action*.—Where a contract, a sum to become payable under which is assigned, is abandoned, and a new contract substituted therefor, the assignee cannot, upon completion of the substituted contract, sue the defendant for the sum stipulated to be paid to him, as the original contract, the rights under which were assigned, had never been completed, but he may have some claim for damages. (*i*)

Where the builder and the architect have conspired together to give false certificates, this is a good defence by the employer to an action by an assignee of the amount due to the builder, and the employer need not give notice to the assignee of the fraud until the assignment is sought to be enforced. (*k*)

(*f*) See *Brice v. Bannister*, 3 Q. B. D. 569, *supra*; *Drew v. Josolyne*, 18 Q. B. D. 596.

(*g*) *Ex parte Moss, Re Toward*, 14 Q. B. D. 310; *Drew v. Josolyne, supra*.

(*h*) *Ex parte Nichols, Re Jones*, 22 Ch. D. 782. But see *post*, p. 160, as to that which has been earned, and *Ex parte Moss, Re Toward, supra*.

(*i*) *Humphreys v. Jones*, 5 Ex. 952. See generally as to the assignability of contracts, *Tolhurst v. Associated Portland Cement Mfrs.* (1903), A. C. 414.

(*k*) *Wakefield, etc., Banking Co. v. Normanton L. Bd.*, 44 L. T. 697.

CHAPTER X.

ADVANCES TO BUILDERS AND MORTGAGES OF BUILDING AGREEMENTS.

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SECT. I.—ADVANCES TO BUILDERS.

(1) MODE OF PROVIDING FOR ADVANCES.

A LANDOWNER, when agreeing to let land to a builder for building, sometimes agrees to lend him money upon the security of the houses to be built and the building materials, and a clause is frequently inserted in the agreement providing for such advances to the builder. (*a*) It is sometimes provided that the landowner will advance sums of money, not exceeding a fixed amount, as the surveyor from time to time certifies.

Another mode of providing for advances, and one which would probably avoid the disputes which not infrequently arise as to the sum to be advanced upon any building, is to refer to a schedule, which should set out the times for making the advances, and also the particular sums to be advanced, during the progress of the work. Thus, when the lessor's surveyor has certified in writing that the brickwork has been completed up to a certain point, so much is to be advanced in respect of each house; and in the same way, when all the brickwork is finished, joints fixed, roofs covered, plastering done, joinery finished, and all complete. (*b*)

(*a*) See forms for advances, *post*, pp. 453, 454, and forms of mortgages by the builder, *post*, pp. 455, 457. For forms of inquiry directed in an action for foreclosure by a mortgagee in possession, and who has laid out money, see *Houghton v. Sevenoaks Estate Co.*, W. N. December 20, 1884, p. 243.

(*b*) See another mode in *Kelly v. Scotto*, 49 L. J. Ch. D. 383, *infra*.

(2) RIGHT TO RECOVER ADVANCES.

Where a landowner agrees to let land and to advance money for building twenty houses, and after six houses are erected and part of the money advanced, the contract is abandoned, the landowner can recover the money so advanced, though the contract is never completed. (c)

Before the whole sum is advanced.

(3) WHETHER PARTNERSHIP CONSTITUTED.

Advances are not unfrequently made to builders under an arrangement to share in the profits derived from the buildings, for the erection of which the advances are made. Such arrangements do not necessarily constitute a partnership. Some rules for determining the existence of partnership are contained in the Partnership Act, 1890, and the case of *Kelly v. Scott* (d) may be referred to, as showing that the agreement there in question (being for advances to a builder in consideration of a share in the profits, in a form not uncommon with builders) does not constitute a partnership.

(4) SOLICITORS NEGOTIATING ADVANCES.

Solicitors should be careful not to advise clients to make advances to builders, or to negotiate the same, without obtaining the opinions of competent surveyors. But although a client may obtain relief against his solicitor for loss sustained by gross negligence, yet where the loss is in respect of a matter of conduct as to which the advice of the solicitor is founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, no claim can be made against the solicitor. (e)

SECT. II.—MORTGAGES OF BUILDING AGREEMENTS.

(1) OLD FORM OF MORTGAGE.

It was formerly usual, in mortgages of building agreements, to include in the mortgage all building materials and plant which

(c) *James v. Cotton*, 7 Bing. 266. See also *ante*, p. 127, *et seq.*, as to assignees under building contracts.

(d) *Kelly v. Scott*, 49 L. J. Ch. D. 383. See also an American case on the same subject, *Curry v. Fowler*, 41 Amer. R. 343 [U. S.].

(e) *Chapman v. Chapman*, L. R. 9 Eq. 276. See also *British Mutual*

should be brought on the land, with power to seize and sell the same on default; but recent decisions show that such clauses are void under the Bills of Sale Acts, 1878 and 1882.

(2) WHETHER MORTGAGE OF BUILDING MATERIALS IS A BILL OF SALE.

It has long been settled that an ordinary building agreement between a landowner and a builder is not brought within the Bills of Sale Acts, as regards plant and materials, merely by reason of a provision in it, that the plant and materials, when brought upon the land, are to be considered as annexed to the land, or are to become the property of the lessor or building owner. (*f*) The ground of these decisions appears to be that such a provision is, in effect, a contract that the chattels are to vest absolutely in the lessor or building owner, as part of the land, or in him as landowner, and that such a contract is not similar to the assignments or assurances specified in the Bills of Sale Acts.

Mortgage of interest in building agreement to stranger.

A mortgage, however, by a builder of his interest in a building agreement to a stranger, to secure money advanced by the stranger to enable the builder to carry out the building agreement, differs very materially from a mere building agreement, and if it include plant and materials, is void under the above-named Acts so far as such plant and materials are concerned, (*g*) whether the mortgage contain an *express* power of sale, (*h*) or not. (*i*)

The result would, therefore, seem to be that in no case can the plant be mortgaged otherwise than by a duly registered bill of sale in the form given in the Act of 1882. As to the building materials, such of them as are actually used on the building become part of the land in accordance with the maxim, "*Quidquid plantatur solo, solo cedit*;" other materials are chattels, and can only be dealt with by mortgage by registered bill of sale.

Investment Co. v. Cobbold, L. R. 19 Eq. 627; *Whiteman v. Hawkins*, 4 C. P. D. 13; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394.

(*f*) *Brown v. Bateman*, L. R. 2 C. P. 272; *Blake v. Izard*, 16 W. R. 108; *Ex parte Newitt*, 16 C. D. 522; *Reeves v. Barlow*, 12 Q. B. D. 436. See *post*, p. 171.

(*g*) *Climpson v. Coles*, 23 Q. B. D. 465; *Church v. Sage*, 41 W. R. 175.

(*h*) *Climpson v. Coles*, *supra*.

(*i*) *Church v. Sage*, *supra*; as to trade machinery, see *Re Yates, Batchelder v. Yates*, 38 C. D. 112; *Re Lusty*, 60 L. T. 160; *Small v. National Provincial Bank of England*, [1894] 1 Ch. 686. See, too, *Cumberland Union Bank v. Maryport, etc., Co.*, [1892] 1 Ch. 415; *Gough v. Wood*, [1894] 1 Q. B. 713; *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600.

(3) RESTRICTION ON CONSOLIDATION OF MORTGAGES.

The Conveyancing Act, 1881, (k) provides that a mortgagor seeking to redeem any one mortgage shall be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem, unless a contrary intention is expressed in the mortgage deeds or one of them. In the case, therefore, of loans to builders, where it is intended to make numerous advances, the right to consolidate should be reserved. (l)

Care necessary in loans to builders.

(4) TRUSTEES ADVANCING MONEY ON MORTGAGE.

A trustee lending money on mortgage is not chargeable with breach of trust by reason only of the proportion borne by the amount of the loan, to the value of the property at the time when the loan was made, provided that in making the loan :

(1) The trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer ;

(2) The surveyor or valuer was instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere ;

(3) The amount of the loan does not exceed two equal third parts of the value of the property as stated in the report ;

(4) The loan was made under the advice of the surveyor or valuer expressed in the report. (m)

(k) 44 & 45 Vict. c. 41, s. 17.

(l) See, too, for recent limitations of the doctrine, *Jennings v. Jordan*, 6 A. C. 698 ; *Harter v. Colman*, 19 Ch. D. 630 ; *Cummins v. Fletcher*, 14 C. D. 699 ; *Re Raggett*, 16 C. D. 117 ; *Pledge v. Carr*, [1895] 1 Ch. 51 ; *Minter v. Carr*, [1894] 3 Ch. 498 ; and see *Re Salmon* (1903), 1 K. B. 147, as to right of mortgagor's trustee in bankruptcy.

(m) Trustee Act, 1893, s. 8. See *Leaoyd v. Whiteley*, 12 A. C. 727, where trustees were held liable for having acted without ordinary prudence ; and see also *Smethurst v. Hastings*, 30 Ch. D. 420.

CHAPTER XI.

TIME, PENALTIES, AND FORFEITURE.

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SECT. I.—TIME.

(1) PRELIMINARY.

PERFORMANCE of the work comprised in a building contract must be completed at or within the time fixed by the contract. Where there is no time fixed by the contract, the work must be done within a reasonable time, having regard to the nature of the work and all the circumstances. (a)

(a) Co. Lit. 56 b; see *per Rolfe, B.*, in *Startup v. Macdonald*, 6 M. & G. 611; *per Cur.* in *Ford v. Cotesworth*, L. R. 4 Q. B. 133. See *Fisher v. Ford*, 4 Jur.

Building contracts usually contain a condition binding the builder to complete the works within a fixed time ; (b) and, when an allowance is to be made if the works be delayed by reason of any inclement weather, alteration, or causes not under the builder's control, or in case of strikes or lock-out affecting any of the building trades, it is advisable, instead of stipulating that the builders are then to complete the works within such time as shall be reasonable, to provide that the builder shall do so within such time as the architect shall consider to be reasonable, and shall from time to time in writing appoint.

(2) GENERAL RULES AS TO TIME.

Whilst at law the mere delay in performance would operate as a breach of contract, and disentitle the party in default from further asserting his rights, a Court of Equity would, as a rule, relieve against the legal consequences, notwithstanding the delay, upon equitable terms ; it was, therefore, said that in equity time is not considered to be of the essence of the contract. (c)

But now, by the Judicature Act, 1873, (d) it is enacted that " stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity." (e)

By express provision in the contract time may be made essential, as, where, in addition to merely naming a day, the parties introduce words clearly showing that this was their intention. (f) Time may also be made essential where it was not originally so, or where the condition of time has been waived, by giving notice clearly expressing the intention of abandoning the contract if not completed within a given time, which must be a reasonable time, having regard to the circumstances. (g)

1034, as to a covenant to build within a reasonable time, and a defence that the house remained unbuilt, with the plaintiff's consent, and that a reasonable time had not since elapsed.

(b) See Cl. 3, *post*, p. 376.

(c) *Roberts v. Berry*, 3 D. M. & G. 284. As to Specific Performance, see *post*, Chap. XVI.; *Tilley v. Thomas*, L. R. 3 Ch. 67; *Parkin v. Thorold*, 16 Beav. 59.

(d) 36 & 37 Vict. c. 66, s. 25 (7).

(e) See *Noble v. Edwards*, 5 Ch. D. 378; *Patrick v. Milner*, 2 C. P. D. 342.

(f) *Hudson v. Temple*, 29 Beav. 536.

(g) *Green v. Sevin*, 13 Ch. D. 589; *Compton v. Bagley*, [1892] 1 Ch. 313.

by subject¹
of contract.

The subject of the contract may impliedly make the time of completion essential; as where possession is required for the purpose of immediate building, (*h*) or where a lease for building is subject to forfeiture if the building is not completed by a certain day. (*i*)

Question of
time settled
by employers.

Sometimes the question whether there has been delay or not is left for the employers to decide. Where by a building contract certain matters causing delay and "other causes beyond the contractor's control" were to be submitted to the board of directors of the owners of the building, who were to "adjudicate thereon and make due allowance therefor, if necessary, and their decision shall be final." It was held that the exclusive jurisdiction of the board did not extend to delay caused by interference by the building owners or their architect with the conduct of the works, by default in not giving the contractors possession of the premises, and in not providing plans and drawings in due time; and so, interference and defaults being made out, the building owners could not recover penalties. (*k*)

Delay caused
by employers.

As to the relief of the builder when delay is caused by the employers, see *post*, p. 148.

Slight delay
in comple-
tion.

The builder will not be prevented from recovering payment, as previously stated, (*l*) if there has only been a slight delay in the completion, and the contract in other respects has been substantially carried out; any inconvenience occasioned by such delay to the employer being a matter for compensation in damages. (*m*)

(3) MEANING OF PARTICULAR TERMS AS TO TIME.

A contract to be performed "directly" means to be performed not within a reasonable time, but speedily, or, at least, as soon as practicable. (*n*) "Forthwith," in a contract, was held not necessarily to mean immediately. (*o*) In computing a given period

(*h*) *Wright v. Howard*, 1 S. & S. 190; *Nokes v. Lord Kilmorey*, 1 De G. & Sm. 444.

(*i*) *Barclay v. Messenger*, 43 L. J. Ch. 449.

(*k*) *Wells v. Army and Navy Co-operative Society, Ltd.* (1902), 86 L. T. 764. As to the validity of clauses referring matters in dispute to one of the parties, see Chap. V. sect. I. (6), p. 37, *ante*.

(*l*) See *ante*, p. 126.

(*n*) *Lucas v. Godwin*, 3 Bing. N. C. 737; *Littler v. Holland*, 3 T. R. 590; *Maryon v. Carter*, 4 C. & P. 295; *Kingdom v. Cox*, 2 C. B. 661. See the remarks of James, L.J., in *Wilkinson v. Clements*, L. R. 8 Ch. at p. 106.

(*o*) *Duncan v. Topham*, 8 C. B. 225.

(*p*) *Roberts v. Brett*, 34 L. J. C. P. 241. See *Ex parte Sullivan*, 36 L. J. B. 1; *Hudson v. Hill*, 43 L. J. C. P. 273; *Ex parte Lamb*, L. R. 19 Ch. D. 169.

of time "from" or "after" a specified act or event, the day of the act or event is to be excluded, and the last day of the given time included. (p) The words "at" or "on" or "upon" a certain time or event, or like expressions, mean *before* or *simultaneously with*, or *after* the act or event referred to, in accordance with a reasonable construction of the context. (q) The term "months" means in law lunar months, unless the context shows, or there is admissible evidence of an intention in the parties, that the word was used to denote calendar months. (r) In all Acts of Parliament passed since 1850, or in any document which is part of any legal procedure, "month" means calendar month, unless otherwise expressed. (s) In bills of exchange and promissory notes, and in most mercantile instruments, month means calendar month.

(4) EFFECT OF EXTRAS ON TIME CONDITIONS.

Subject to any express terms in the agreement, a subsequent order by the employer for extra work, which necessitates additional time, may entitle the builder to claim the time necessary, under the circumstances, to execute the extra work in addition to that originally fixed, but as regards the stipulation as to time in all other respects, the original contract will stand; with the exception that if the order for extra work is so inconsistent with the terms of the original contract that they cannot subsist together, and it becomes impossible to complete the work in the first agreement until the additional work is completed, the subsequent agreement will be construed to discharge the former. (t) And consequently, if the employer knew, or must have known, that the additional work would render it impossible to perform the contract as origi-

How far order for extra work affects stipulations as to time.

(p) *Lester v. Garland*, 15 Ves. 257; *Gorst v. Lowndes*, 11 Sim. 434; *Robinson v. Waddington*, 13 Q. B. 753; *Young v. Higgon*, 6 M. & W. 49.

(q) *Per Cur.* in *The Queen v. Humphrey*, 10 A. & E. 370; and in *The Queen v. Arkwright*, 12 Q. B. 970. See also *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

(r) *Simpson v. Margitson*, 11 Q. B. 23; *Hutton v. Brown*, 45 L. T. 343. See *Lang v. Gale*, 1 M. & S. 111; *Cockell v. Gray*, 3 B. & B. 186; *Turner v. Barlow*, 3 F. & F. 946. But see *Hipwell v. Knight*, 1 Y. & C. 401. See *Catesby's Case*, 6 Co. 62 a, as to a "twelvemonth."

In calculating a calendar month, if the computation commences during the course of a month, the right method is to proceed from a given day in one month to the day with the corresponding number in the ensuing month: *Freeman v. Read*, 11 W. R. 802.

(s) R. S. C. 1883, Order 61, r. 1. As to calendar months, see *Migotti v. Colville*, 27 W. R. 744; Interpretation Act, 1889, 52 & 53 Vict. c. 63.

(t) As to the effect of subsequent agreements, see *ante*, p. 142.

nally made, the second agreement will operate as a waiver of the stipulation as to time in the first agreement, and as a consent that the completion of the work shall be postponed until after the lapse of a reasonable time for carrying out the work as altered.

It will thus be seen that where a contractor undertakes to do certain works, subject to alterations, within a prescribed time, he will be held to be excused by the employer ordering such alterations as render completion within the time impossible. (*u*)

"If it were not so, it would be a most unreasonable burden to put upon the builder to do extra works, and then, if the whole works are not completed within the specified time, to claim the specified penalties from him." (*w*)

Illustration.

Suppose a builder contract, under a penalty, to build and completely finish two houses within a given time, and No. 2 is not completed within the time: it would be no answer for him, when sued for the penalty, to say that he was prevented from completing it, because the employer had required an alteration to No. 1. But if the alterations ordered to No. 1 are so mixed up with the work specified in the original agreement that it is impossible to complete No. 2 and the work in the first agreement mentioned, until the additional work is also completed, this will be a good defence by the builder to an action on the original contract.

Express agreement to do work and any alterations within specified time will be enforced, however unreasonable.

However unreasonable the time specified in the contract may be, and notwithstanding extra work to a considerable extent may be ordered, if the builder choose to contract positively and absolutely to do certain works, and also any alterations, additions, or variations within a given time, the Court will not, in the face of such a stipulation, infer a condition that is at variance with the express terms of the contract, or relieve the builder because it happens to operate hardly. (*x*) If the parties choose even arbitrarily, provided both of them intended to do so, to stipulate for a particular thing to be done at a particular time, such a stipulation is effectual, and

(*u*) *Westwood v. Secretary of State for India*, 11 W. R. 261; *Holme v. Guppy*, 3 M. & W. 387; *Thornhill v. Neats*, 8 C. B. N. S. 831; *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149; *Legge v. Harlock*, 12 Q. B. 1015. See *Fletcher v. Dyche*, 2 T. R. 32; *Macintosh v. Midland Counties Ry. Co.*, 14 M. & W. 548; *Hunt v. South Eastern Ry. Co.*, 45 L. J. C. P. 87, as to a substituted contract, and the power of sale and lien being lost by such substitution.

(*w*) *Per Esher, M.R.*, in *Dodd v. Churton* (1897), 1 Q. B. 565, cited *infra*.

(*x*) *Jones v. St. John's College*, L. R. 6 Q. B. 115; and see *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310; *Oakden v. Pike*, 34 L. J. Ch. 620; *Tew v. Newbold-on-Avon School Board*, 1 Cab. & El., 260.

the parties are bound by their contract, even though it involve an impossibility. (y)

Where, however, in a contract for the execution of the specified works it is provided that the works shall be completed by a certain day, and, in default of such completion, the contractor shall be liable to pay liquidated damages, and there is also a provision that other work may be ordered by way of addition to the contract, and additional work is ordered which necessarily delays the completion of the works, the contractor is exonerated from liability to pay the liquidated damages, unless by the terms of the contract he had agreed that, whatever additional work may be ordered, he will nevertheless complete the works within the time. (z)

Ordering of
extras.

The contract in this case contained a clause providing that any authority given by the architects for any alterations or additions in or to the works was not to vitiate the contract. Dealing with the effect of this clause, Collins, L.J., said: (a) "I do not think this amounts to a contract to do all the works, including any extras that may be ordered within the time specified for the performance of the original work. The clause appears to me to be capable of another and a more reasonable construction. . . . The provision is that the contract is not to be vitiated, i.e. that it is to stand, but that does not exclude the application of the principle stated in Comyn's Digest, Condition L. (6), that where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from the performance of it."

(5) BAD WEATHER NO EXCUSE FOR DELAY.

Severity of weather will not relieve a contractor from liability for delay where he is under express contract to execute certain works within a certain time. But where no definite time is fixed by the contract, and the contractor's obligation is therefore to complete the work within a reasonable time, hindrances caused by weather have to be allowed for in computing such reasonable time.

(6) EXTENSION OF TIME.

An extension of time may be given by sufficient agreement of the parties, without waiving the condition as to time being of the

(y) *Oakden v. Pike*, *supra*.

(z) *Dodd v. Churton* (1897), 1 Q. B. 562.

(a) At p. 562.

essence of the contract, further than substituting the extended time. (*b*)

By delay in negotiations.

And so long as negotiations continue between the parties for completion of the contract, the time, though in the first place essential, is extended. (*c*)

By certificate of architect.

A clause giving the architect or engineer power to extend the time by certificate is frequently inserted in contracts for large works. See Clause 25, *post*, p. 388.

Extension may be implied from final certificate.

Where disputes as to delay exist, and the architect gives a final certificate, it may become a question whether or no the certificate is a final settlement of such disputes and a bar to any action in respect of them. Where the architect by the contract has jurisdiction to decide upon all disputes, and to enlarge the time limited for completing the work, and his certificate is to be final and conclusive, and in preparing his final certificate he does in fact take the matter of delay into consideration so that his certificate is in the nature of an award upon the matter, it is evident that unless the certificate can itself be impeached, it makes an end of the question of delay. On the other hand, the architect may not, under the contract, have jurisdiction to deal with the question of delay, or in making his certificate he may not attempt to do so, in either of which cases the certificate would not in any way conclude the matter in dispute. The precise terms of the contract and the language of the certificate itself must be had regard to in considering any question of this nature. (*d*)

SECT. II.—PENALTIES.

(1) PENALTIES OR LIQUIDATED DAMAGES.

(*a*) *Generally*.—A contract may in express terms assess the sum to be paid as the liquidated damages for a breach, and building contracts usually stipulate for a fixed sum to be paid daily or weekly for delay in completing the work; (*e*) a contract may also

(*b*) *Barclay v. Messenger*, 43 L. J. Ch. 449, *supra*, p. 138.

(*c*) *Hudson v. Bartram*, 3 Madd. 440; *Wood v. Bernal*, 19 Ves. 220; *Southcomb v. Bishop of Exeter*, 6 Hare, 213; *Murray v. Spicer*, L. R. 5 Eq. 527; *Webb v. Hughes*, L. R. 10 Eq. 281.

(*d*) See *British Thomson Houston Co. v. West Bros.* (1903), 19 T. L. R. 493.

(*e*) *Fletcher v. Dyche*, 2 T. R. 32; *Jones v. St. John's College*, L. R. 6 Q. B. 115; *Law v. Redditch*, *infra*.

fix a sum of money to be paid on a breach, with no intention of assessing the damages, *e.g.* a bond with a penalty. (*f*) The question whether a sum is a penalty or liquidated damages is a question of law, to be decided by the judge upon a consideration of the whole instrument. (*g*)

(*b*) *Relief against Penalties.*—In the case of a penalty, the Courts of Equity always exercised jurisdiction to relieve against the judgment at law upon payment of the sum really due, or the actual damages occasioned by the breach of contract; and they used to direct an issue, *quantum damnificatus*; and, when the amount of damages was ascertained by a jury upon the trial of such an issue, they granted relief upon the payment of such damages. (*h*) And now, therefore, although the penalty be forfeited and payable according to the terms of the contract, relief in all Courts will, in general, be given upon equitable principles against the full penalty by allowing only the damage really incurred by the non-performance.

But, on the other hand, where building contracts are construed as stipulating for liquidated damages and not for a penalty, no occasion arises for equitable relief against the payment. In this case the Court will not interfere, but will deem the parties entitled to fix their own measure of damages, and the whole sum is recoverable, and no more, both at law and in equity, by force of the agreement. (*i*) It is, consequently, important to determine whether the sum expressed in the contract to be payable for a breach is of the one kind or the other.

Where relief
will not be
granted.

(*c*) *Use of the phrase "Liquidated Damages" not Conclusive.*—Persons who intend that the breach of a building contract shall involve the payment of a fixed sum, independently of the amount of actual damage thereby sustained, should stipulate for the payment as "liquidated damages," (*k*) though the use of that term is not conclusive, for, as just stated, it is a question of construction

(*f*) *Shuman v. Walter*, 1 Bro. C. C. 413.

(*g*) *Wallis v. Smith*, 21 Ch. D. 243, where the several cases distinguishing "penalties" from "liquidated damages" were considered and explained by Jessel, M.R.

(*h*) *Per Cur.* in *Kemble v. Farren*, 6 Bing. 148; Mansfield, C.J., in *Lowe v. Peers*, 4 Burr. 2229; and see *Wyllie v. Wilkes*, 2 Doug. 522; *per* Bramwell, B., in *Betts v. Burch*, 4 H. & N. 510; and see *Re Newman*, 4 Ch. D. 733. But see *Wallis v. Smith*, 21 Ch. D. 243.

(*i*) *Lowe v. Peers*, 4 Burr. 2223; and see *Clydebank Co. v. Yzquierdo Castañeda*, (1905) A. C. 6; *Diestal v. Stevenson*, (1906) 2 K. B. 345.

(*k*) *Astley v. Weldon*, 2 Bos. & P. 346; *Betts v. Burch*, 4 H. & N. 510, *supra*; *Gosworthy v. Strutt*, 1 Ex. 639.

depending upon the whole of the agreement. (*m*) And there are numerous cases, where sums made payable as liquidated damages, and not as penalty, have been nevertheless construed as penalties. (*n*) But this has never been done, except in cases like *Kemble v. Farren*, (*o*) where the damages were made payable, not on one single event, but on a number of events, some of which might result in very inconsiderable damages. (*p*) And, so also, the Courts have frequently held that a sum stipulated by use of the word "penalty" was, from the circumstances of the case and the nature of the agreement, to be construed as liquidated damages, and that it was consequently recoverable in full. (*q*) Whether, therefore, the sum, mentioned in an agreement to be paid for a breach, is to be treated as a penalty or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument. (*r*)

(*d*) *Canon of Construction and Exceptions.*—One rule which appears to be recognised in the cases as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some *one* thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded as liquidated damages and not as a penalty. (*s*)

The rule was also stated in a recent case in the Privy Council: "The criterion of whether a sum—whether it is called penalty or liquidated damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. (*t*)

Exceptions.

One recognised exception to such a rule is where a sum of money

(*m*) *Law v. Local Board of Redditch*, [1892] 1 Q. B. 127.

(*n*) *Boys v. Ancell*, 7 Scott, 364; *Kemble v. Farren*, 6 Bing. 141; *Reindell v. Schell*, 4 C. B. N. S. 97.

(*o*) 6 Bing. 141.

(*p*) *Per Kay, L.J., Law v. Local Board of Redditch*, [1892] 1 Q. B. 127, *supra*; and see *Willson v. Love* (1896), 1 Q. B. 626.

(*q*) *Sparrow v. Paris*, 7 H. & N. 594; *Parfitt v. Chambre*, L. R. 15 Eq. 36; *Elphinstone v. Monkland*, 11 A. C. 332.

(*r*) *Per Wilde, C.J., in Sainter v. Ferguson*, 7 C. B. 716. *Per Bramwell, B., in Betts v. Burch*, 4 H. & N. 511. *Per Coleridge, C.J., in Magee v. Lavell*, L. R. 9 C. P. 115; *Wallis v. Smith, infra*. And see *Ranger v. Great Western Ry.*, 5 H. L. C. 72, 105, as to construction being the same at law and in equity.

(*s*) See, for example, *Strickland v. Williams* (1899), 1 Q. B. 382.

(*t*) *Cape of Good Hope Government v. Hills*, 22 T. L. R. 589.

is to be payable upon the non-payment of a smaller specified sum, in which case the Courts have treated the larger sum as a penalty, not as liquidated damages; another exception would probably be where the sum agreed to be paid is, with regard to the matter in respect of which it is agreed to be paid, so large as to make the idea that it was intended to be payable by way of liquidated damages so absurd that the Court would be compelled to arrive at the conclusion that it was to be paid, not as liquidated damages but as a penalty. (u)

(v) *Illustrative Cases*.—In *Law v. Redditch Local Board* (w) the contract provided that “the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30, 1889, and in default of such completion, the contractor shall forfeit and pay to the urban authority the sum of £100, and £5 for every seven days during which the works shall be incomplete after the said time, and the sums so forfeited may be recovered by the urban authority from the contractor as and for liquidated damages,” and inasmuch as the sums agreed to be paid as liquidated damages were payable on a single event only, viz. non-completion of the works, it was held they were to be regarded as liquidated damages, not as penalties. (x)

Where the damage is altogether uncertain and yet a definite sum of money is expressly made payable in respect of it, by way of liquidated damages, the words will be read in their ordinary sense as meaning liquidated damages and not as a penalty. (y)

On the other hand, when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification. (z). This is most obviously the case when one of the stipulations is for the payment of a sum of money of less amount than the penal sum named. (a)

Where the plaintiff agreed to execute certain specified work—in

(u) *Law v. Local Board of Redditch*, *supra*; *Re Newman*, L. R. 4 C. D. 721; *Fletcher v. Dyche*, 2 T. R. 32; *Cruz v. Aldred*, 14 W. R. 656; *Wallis v. Smith*, 21 Ch. D. 243. See *Bonsall v. Byrne*, 1 Ir. R. C. L. 573; *Browne v. Phillips*, 10 L. R. (Ir.) 212; *Bradley v. Walsh*, 88 L. T. 737.

(v) *Supra*.

(x) See the judgments in this case for the meaning of “completion.”

(y) *Galsworthy v. Strutt*, 1 Ex. 665, confirming *Green v. Price*, 13 M. & W. 695.

(z) *Elphinstone v. Monkland*, 11 A. C. 332.

(a) *Kemble v. Farren*, 6 Bing. 141; *Astley v. Weldon*, 2 B. & P. 346.

and about laying electric wires and blocks by a certain date, and to fix certain electric lamps and fittings which were to be supplied to him by the defendant within fourteen days from the delivery to him of such fittings. The plaintiff wrote as follows: "I undertake to carry out the work in connection with the cables, wires, and fittings in strict accordance with the specification and schedule within the time stated in the said specification for the sum of £76 10s., and I consent to pay the sum of £5 as liquidated damages, and not as a penalty, for every day exceeding the number of days within which the work has to be completed." The work was so badly done that it had to be done over again, a different and inferior quality of wire from that specifically named was put in, and the conduct of the plaintiff was such as to entitle the defendant to take the contract out of his hands. The referee, while giving the plaintiff the value of some materials used by the defendant, allowed the defendant a set-off and counterclaim for £50 liquidated damages, and gave judgment for the defendant for a balance of £38 1s. It was held by the Court of Appeal that a sum of £5 was agreed upon as liquidated damages for each day's delay in executing each part of the contract; that the times limited were two separate periods, at the expiration of which the damages began to accrue, and not one continuous period at the end of which only they became payable; that the word "work" (in the singular) must be read in reference to two separate classes of work as to which "times" (in the plural) were by the contract expressly assigned; and the damages, for the same reason, were specific sums agreed upon for each breach of presumably equal importance since the effect of each was identical, viz. delay, and therefore presumably to be compensated by the same sum per diem. (*b*)

Again, where a contract for an electric lighting installation provided that the work should be "completed in all respects on or before the 26th Nov., 1898, subject to a penalty of £15 per day, and the plant by the 10th Dec., subject to a penalty of £3 per day for every day the work remains unfinished to the satisfaction of the authorities or engineers." It was held that, although the word "penalties" was used, the amounts accrued owing to the default of the contractor were in fact liquidated damages. (*c*)

Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, and some of which may be for the payment of money on a given day, in these cases

(*b*) *Stegmann v. O'Connor*, 81 L. T. 627.

(*c*) *White v. Arthur*, 84 L. T. 594.

the rule as to construing as a penalty does not apply, and the bargain of the parties will be given effect to. (*d*)

The fact that the payments stipulated are made proportionate to the extent of the breach of contract, or that they are to bear interest from the date of the breach, point to the conclusion that payments so adjusted are liquidated damages. (*c*)

If all the events on which the sum is made payable are matters of substantial damage, then the sum is payable as liquidated damages, not penalty. (*f*)

(*f*) *Course to be adopted in the case of Different Stipulations of Different Kinds.*—Having regard to the doubt arising from the decisions on the subject, (*g*) where the contract is to contain different stipulations of different kinds, the agreement, instead of fixing one sum to be paid for any breach of whatever kind, should provide for the payment of a fixed sum for the breach of each particular stipulation; and, where no contrary intention is shown, such sum may be recovered as liquidated damages. (*h*) In the case of *In re Newman, Ex parte Capper*, (*i*) where a building contract provided for completion of the works by a stated day, and in default the contractors were to forfeit to the employer £10 per week for every week after that date during which the buildings should remain unfinished, and the contract also contained various other stipulations, with a final provision that, in case the contract should not be in all things duly performed by the contractors, they should pay to the employer £1000 as and for liquidated damages; it was held that the sum of £1000 was in the nature of a penalty, and that the employer could only recover the actual damage he had sustained by the delay in the completion of the works.

Penalties should be fixed for each breach.

(*d*) *Wallis v. Smith*, 21 Ch. D. 243, at p. 258; *Pye v. British Automobile Syndicate, Ltd.*, 22 T. L. R. 287.

(*c*) *Elphinstone v. Monkland*, 11 A. C. 332, *supra*. And see also *per Kennedy, J.*, in *White v. Arthur*, 17 T. L. R. 461, at p. 462.

(*f*) *Wallis v. Smith*, 21 Ch. D. 243.

(*g*) *Wallis v. Smith*, 21 Ch. D. 243, where see the cases fully considered by Jessel, M.R.

And see *per* Heath, J., in *Astley v. Weldon*, 2 B. & P. 353, adopted by James, L.J., in *Re Newman*, L. R. 4 C. D. 724, *supra*, at p. 731; *per* Bayley, J., in *Davies v. Penton*, 6 B. & C. 223, adopted by Alderson, B., in *Horner v. Flintoff*, 9 M. & W. 681; and see *Green v. Price*, 13 M. & W. 695; *Boys v. Ansell*, 7 Scott, 364.

(*h*) *Kemble v. Furren*, 6 Bing. 141. See *Reilly v. Jones*, 1 Bing. 302; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Lea v. Whitaker*, L. R. 8 C. P. 70.

(*i*) 4 Ch. D. 721; and see *Law v. Local Board of Redditch*, *supra*, p. 144.

(2) ENFORCING PENALTIES AND LIQUIDATED DAMAGES.

Option to bring action for damages or penalty.

The party entitled under a deed containing covenants, or under a simple agreement, to build, with a penalty, (*k*) may either bring an action of debt for the penalty, or may proceed as for breach of the covenant or agreement, and recover full damages exceeding the penal sum, as the penalty is auxiliary to the performance of the contract. (*l*) But the party entitled totally discharges the other party from any future obligation after he has taken the penalty. (*m*)

Specific performance or injunction notwithstanding penalty or liquidated damages.

Specific performance is seldom granted in the case of building contracts, (*n*) but where such relief can be given, and the contract contains a stipulation for a fixed sum payable in the event of non-performance, whether as liquidated damages, or as a penalty, this does not release the parties from their agreement, and, if there appears to be no intention that the act may be done on payment of the money, the contract will, notwithstanding the stipulation, be enforced by specific performance or injunction. (*o*)

Claims cannot be made for both.

But the Court, in granting an injunction or decreeing specific performance, will impose the term of not claiming the liquidated damages or penalty; and the party entitled cannot claim an injunction or specific performance in respect of a breach, if he has previously sued for and recovered the liquidated damages for it, upon the same ground that he cannot bring an action for damages after he has taken the penalty. (*p*) But a claim to damages may be supported in respect of a past breach, with specific performance or an injunction for the future. (*q*)

No penalty recoverable when delay caused by the employer.

In the absence of a special agreement to the contrary, if the builder be delayed in the work contracted for, or otherwise prevented from completing the contract within the time limited, by the act of the employer, the former will not be liable in law

(*k*) In an action upon a bond no damages beyond the penalty can be recovered.

(*l*) *Per* Mansfield, C.J., in *Lowe v. Peers*, 4 Burr. 2228; and in *Bird v. Randall*, 3 Burr. 1352; *per Cur.* in *Harrison v. Wright*, 13 East, 343.

(*m*) *Bird v. Randall*, *supra*. See *Carnes v. Nesbitt*, 7 H. & N. 158.

(*n*) See *post*, Chap. XVI., as to specific performance of contracts to build, etc. See *post*, Chap. XIX., at p. 234, *et seq.*, under "Covenants," as to penal rents in building leases.

(*o*) *Per* Hardwicke, L.C., in *Howard v. Hopkyns*, 2 Atk. 370. And see *per* Sugden, L.C., in *French v. Macale*, 2 Dr. & W. 272, 284; *per* Knight-Bruce, L.J., in *Coles v. Sims*, 5 D. M. & G. 9. And see *Re Dagenham Dock Co.*, L. R. 8 Ch. 1022; *Barret v. Blagrove*, 5 Ves. 555; *Jones v. Heavens*, 4 Ch. D. 636.

(*p*) *Howard v. Woodward*, 34 L. J. Ch. 47; *Saintier v. Ferguson*, 1 M. & G. 286.

(*q*) *Carnes v. Nesbitt*, 7 H. & N. 158.

for the default, or for any penalties during such delay, and in some cases he may be excused from performing the agreement contained in the original contract, and from the payment of penalties altogether. (r) In *Holme v. Guppy* (s) there was a contract to do work within a *given time*, viz. four months from the date of the contract, and in default to forfeit £40 per week for each week of delay beyond the prescribed time, as liquidated damages. The plaintiffs did not begin the work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession; they were afterwards delayed one week by the default of their own workmen, and four weeks by the default of the masons employed by the defendants; and the work was not completed till five weeks after the time limited. It was held, upon these facts, that the plaintiffs were not liable to penalties for the delay, either for the one or the four weeks; as the plaintiffs undertook to complete the work in a *given* four months, and the particular time was extremely material, because they probably would not have entered into the contract unless they had had the specified four months and a half, within which they could work a greater number of hours a day.

The same result follows where it is also agreed that if the work should not be completed for any cause not under the control of the contractor, then the penalty should not be enforced for such number of days as the employer's agent should name in a certificate, although no such certificate is given. (t).

Similarly, where the delay was caused by the employer ordering extra works, the builder was excused from paying penalties. (u)

Delay caused by ordering extras.

So, also, where the delay was caused by not providing the required plans, and setting out the ground, for building works. (w)

Delay caused by not providing plans.

Again, where delay was caused by a dispute between the building

(r) See *ante*, p. 37, as to recovering damages; Com. Dig. Condition (L. 6).

(s) 3 M. & W. 387; *Thornhill v. Nests*, 8 C. B. N. S. 831; and see *Westwood v. Secretary of State for India*, 11 W. R. 261; *Legge v. Harlock*, 12 Q. B. 1015; *Lawson v. Wallasey L. Bd.*, 52 L. J. Q. B. 302; and in Court of first instance, 11 Q. B. D. 229. And see *ante*, p. 112, as to right of builder to payment. See also *Wells v. Army and Navy Co-operative Society, Ltd.*, 86 L. T. 761.

(t) *Russell v. Si Du Bandeira*, 13 C. B. N. S. 149.

(u) *Dodd v. Churton* (1897), 1 Q. B. 562.

(w) *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310; *Bush v. Trustees, etc., of Whitehaven*, 52 J. P. 392. As to implied contract by the employer to do certain things within a reasonable time, see *Lawson v. Wallasey L. Bd.*, 52 L. J. Q. B. 302, and in Court of first instance, L. R. 11 Q. B. D. 229, and *ante*, p. 37. See *ante*, p. 93, *et seq.*, as to the architect's certificate generally; and *ante*, p. 149, when the contract is express, that damages are to be paid for delay by whomsoever caused.

owner and a third party in relation to a party wall, the builder was held not to be deprived of a bonus for expedition. (*x*)

Sums payable
for delay may
be set off.

A contract may be made with an express stipulation to set off mutual claims arising under it, as a building contract with a stipulation that penalties for delay shall be deducted from the contract price, (*y*) or with a condition that works and materials provided by the employer shall be allowed for in the price, (*z*) or with the condition, express or implied, that the contract price shall be reduced by the damages recoverable for defective work or delay in completion, (*a*) and now such claims, apart from express stipulation, could be set off or set up by way of counterclaim by the defendant under the rules of the Supreme Court. (*b*)

Double
remedy—
to deduct or
recover
penalty.

Under agreements of the above description, where it is stipulated that if the work be not completed within a fixed time the builder shall forfeit a certain sum weekly, such penalty to be deducted from the amount which may remain due on the completion of the work; if the contract price be paid without making any deduction for payments which have become due under such stipulation; the employer will be entitled, after having paid the contract price, to the penalty in an action, brought subsequently, for extra work. He has a double remedy, either to deduct it from the contract price or to recover it. (*c*)

Waiver of
penalty.

A clause providing that the builder shall not be liable for penalties if delay is caused by accidental fire is sometimes inserted in the building contract. A form of such a clause will be found *post*, p. 391.

(3) BONUS CLAUSES.

Clauses are sometimes inserted in contracts for buildings or large works providing that the builder or contractor shall be entitled to a *bonus* if he complete the work within the time limited by the contract. (*d*) It has been decided in New Zealand that if a contract contains such a clause, and the engineer has power to extend the time for the completion of the works, this power is not to be

(*x*) *Bywaters v. Carnick*, Appendix, p. 660.

(*y*) *Jones v. St. John's College*, L. R. 6 Q. B. 115.

(*z*) *Turner v. Diaper*, 2 M. & G. 241.

(*a*) *Young v. Kitchen*, 3 Ex. D. 127; *Newfoundland Government v. Newfoundland Ry.*, 13 A. C. 199.

(*b*) Order 19, r. 3. As to set-off, see *ante*, p. 118.

(*c*) *Duckworth v. Alison*, 1 M. & W. 412.

(*d*) See an example of such a clause in *Ranger v. Great Western Ry. Co.*, 5 H. L. C. 72, at p. 78.

exercised by the engineer for the purpose of enabling the contractor to earn the bonus, but in order to save him from penalties. So where contractors had already earned £600 in the form of bonuses, and claimed further bonus for the time taken, as they alleged, by extra works, it was held that they were not entitled to recover. (c)

Where a builder is prevented from completing the work owing to delays for which the employer is responsible, it has been held that he is nevertheless entitled to recover any *bonus* which the employer has agreed to pay. (f)

Effect of
delay on a
bonus clause.

SECT. III.—FORFEITURE.

(1) FORM OF FORFEITURE CLAUSE.

With a view to securing that there shall be no undue delay in the completion of works in accordance with a contract, it is often provided that the employer shall have power to give notice to the builder to proceed regularly and effectually to complete the work within a certain time. Upon failure to comply with the notice the employer is empowered to enter upon the works, and, if necessary, to employ another builder. A precedent of such a clause will be found at p. 378, *post*.

An interlocutory injunction may, in some cases, be obtained to restrain the builder from preventing the employer taking up and completing the work in pursuance of a condition in the contract, (g) of course, upon the usual undertaking by the employer to abide by any subsequent order as to damages.

If the employers wrongfully exercise their powers under the forfeiture clause, they may be exposed to an action for damages by the builder who is prevented from completing his contract. (h)

Wrongful
exercise of
powers under
forfeiture
clause.

(2) INTEREST ON CAPITAL WHEN THERE HAS BEEN FORFEITURE.

Builders who lay out large sums on their undertakings are usually content to face the fact that capital so invested will not bear interest. The "profit" made on the transaction includes the "interest" which is earned. But assume that, when the job is

(c) *Ware v. Lyttelton Harbour Bd.* (1852), 1 N. Z. L. R., S. C. 191.

(f) *Hynders v. Carnick, Builder*, November 25, 1905, Appendix, p. 660.

(g) *Fletcher v. Dyche*, 2 T. R. 32; *Jones v. St. John's College*, L. R. 6 Q. B. 115; *Law v. Redditch L. Bd.*, [1892] 1 Q. B. 127.

(h) For an instance of a case in which such a claim was made, see *Roome v. Hackney Bath Commissioners*, Appendix, p. 666.

only half completed, and the forfeiture clause is enforced, and the contractors are put off with the bare cost of so much work as they have done, have they no claim for interest upon capital tied up? This point was discussed and decided in a recent case in the Privy Council. (i) A firm of contractors undertook the construction of a railway for the Cape Government on payment of a subsidy of £2000 per mile, to be paid as the work went on. There was a clause in the contract to the effect that if the contractors failed to entirely complete the line, the Government might take possession of the completed portion, and thereafter as soon as the amount of the *actual cost* of the incomplete line should be ascertained by referees, pay to the contractor the amount so ascertained, less the amount of subsidies paid, and certain retention moneys. The value of the incomplete line having been fixed by the referees at £73,500, the contractors sued the Cape Government for this amount, claiming an additional sum for interest. It was held in the Privy Council (affirming the Cape Supreme Court) that the contractors had no claim for interest. In giving the opinion of the Court, Sir Arthur Wilson said: "To add interest seems to us to disregard the plain meaning of the word 'actual' as applied to cost. The referees have here, as practical men, found the cost of the works—in other words, they have said that so much money was expended in order to carry them out. To add something more in the name of interest would be to add something which never would be actual cost, for it would either be a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the particular contractor."

The words
"actual cost"
do not in-
clude interest.

It will be noticed that in this case stress was laid upon the use of the word "actual" as applied to cost. Had this word not been used it is conceived that it would have been open to the Court to say that the contractor was entitled to interest at a reasonable rate.

Within what
time right of
avoiding con-
tract must be
exercised.

(3) TIME FOR ENFORCING FORFEITURE CLAUSES.

Where there is a clause, similar to that in *Walker v. London and North-Western Railway*, (j) providing for the avoidance of

(i) *Cape of Good Hope Government v. Hills*, 22 T. L. R. 589. In *Drew-Bear v. St. Pancras Guardians*, Appendix, p. 681, however, Ridley, J., in assessing damages to builders for breach of contract on the part of building owners in not giving possession of the site, allowed something in the nature of interest on capital tied up. See *ib.*, 682, 685.

(j) 1 C. P. D. 518, distinguishing *Roberts v. Bury Improvement Commissioners*,

the contract, and the forfeiture of the contractor's implements and materials, if he fail to proceed with the work at the rate of progress required in order to complete the works within the period limited for the purpose, or upon certain other events; such a clause can only be acted on, and enforced, before the time originally fixed for the completion of the works has expired. And the exercise of the right of election to rescind a building contract, on the ground of delay, or that the works cannot be completed within the given time, must be signified in an unqualified manner, and, at all events, not after the builder has gone to expense in the reasonable belief, induced by the acts or omissions of the employer, that the right of election would not be exercised, or has altered his position under such circumstances to his prejudice. (k)

Right to be exercised in an unqualified manner.

(4) AUTHORITY OF ENGINEER OR ARCHITECT TO DISMISS BUILDER OR CONTRACTOR.

The authority of the engineer or architect to dismiss the contractor or builder can only be exercised in accordance with the precise terms of the contract.

An engineering contract provided for the completion of the "whole works in a thoroughly sound and workmanlike manner," to the entire satisfaction of the engineer of the defendant council, and also provided for arbitration in the event of any difficulty or dispute arising between the contractor and the engineer as to the mode of carrying out the work, etc. The other conditions dealt with materials, implements, ability of foremen, deviation from plans, etc., and No. 10 gave power to the engineer to dismiss the contractor "if, in the judgment of the engineer, sufficient dispatch is not used." It was held that the arbitration clause applied to all cases where the engineer had to exercise "judgment" as to materials, implements, delay, etc. By direction of the council, the engineer purported to dismiss the contractor for want of dispatch. An injunction was granted to preserve the *status quo*

Illustrative case.

L. R. 5 C. P. 310. See *Mohan v. Dundalk, Newry, and Greenore Ry. Co.*, 6 L. R. (1r) 477, where the time is extended. Cf. *Stadhard v. Stannard v. Lee*, 3 B. & S. 364.

(k) *Moruden v. Sambell*, 28 W. R. 592. A mistaken claim by the employer that a building contract was at an end and to rescind it, does not *ipso facto* operate to rescind the contract, unless the builder demand a rescission on the ground of the mistaken claim. *Ib.* See *ante*, p. 60, as to the building owner allowing the builder to expend money in building in error. As to enforcing a forfeiture in the case of a substituted contract, see *Hunt v. South-Eastern Ry. Co.*, 45 L. J. C. P. 87.

until an award could be made as to the correctness of the engineer's decision (*l*).

(5) NOTICE NECESSARY TO ENFORCE FORFEITURE.

What notice is necessary to take advantage of a clause for determination of contract.

When a contract provides that, if it should appear to the employer or his agent that the work is not properly executed, and with due expedition, it should be lawful for them to give notice in writing to the contractor to alter any improper work, and to supply proper and sufficient materials and labour; and that if he should fail to comply with such notice, then that the employer or his agent may take the work out of his hands; a notice in a *general* form is sufficient. Thus it has been held that the following notice was sufficient: "I give notice to you to supply all proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith; and, further, that if you shall for seven days (the time named in the contract) after the giving of this notice, fail or neglect to comply therewith, I shall as engineer, and on behalf of the corporation, take the works wholly out of your hands." (*m*) But, on the other hand, it seems that, if the employer desired the contractor to do some particular act, for example, to pull down some of his work, he ought to give him a notice to that effect, specifying to what extent he wished to have the work pulled down. (*n*)

(6) WHEN RIGHT OF FORFEITURE MAY BE LOST.

The question, when, or at what time, the right to avoid the contract is lost, is open to some doubt. In *Marsden v. Sumbell*, (*o*) Fry, J., after referring to *Morrison v. Universal Marine Insurance Co.*, (*p*) where the point was left undecided, held that, if the proper view was that the right must be exercised in a reasonable time, three weeks was not a reasonable time; and that if the true view was, that the right is a right to elect at any time, unless the rights of third parties have intervened, or the other party to the contract has altered his position, under the belief that the contract

(*l*) *Foster and Dicksee v. Corporation of Hastings*, 87 L. T. 736.

(*m*) *Pauling v. Dover (Mayor, etc.)*, 10 Ex. 753. See forms of notice, *post*, p. 401.

(*n*) *Ib.*, per Parke, B.

(*o*) *Supra.* See cases *infra*.

(*p*) L. R. 8 Ex. 197, 205. See *Mersey Steel, etc., Co. v. Naylor*, 9 App. Cas. 434.

was a subsisting one, the builder had altered his position under the impression that the contract was still subsisting, by laying out money on drainage pipes and other matters.

It follows, therefore, that when it is intended to take advantage of any breach of covenant or condition in a building lease or contract, so that it should operate as a forfeiture, the landowner or employer must take care not to do anything which may be deemed to be an acknowledgment of the continuance of the tenancy or contract, and so operate as a waiver of the forfeiture. (q) Where a lessee sub-demised land with a covenant by the sub-lessee to finish certain houses thereon, and with a power of re-entry in case of default, and subsequently by deed, reciting the sub-leases, assigned the land subject to the sub-leases; the Court inclined to think that, if the covenant had been broken, the assignment, subject to the sub-leases, would have been a waiver of the forfeiture although the forfeiture was not known to the lessee. (r)

Waiver of forfeiture under building lease or contract.

The question whether building owners have waived their right to enforce the forfeiture clause by delay is a question of fact for the jury to determine. (s)

Waiver a question for the jury.

Where there is a clause in a building agreement, that in case of default in not completing the buildings, *at successive periods*, the owner should be at liberty to re-enter and seize the materials, and successive defaults are made, and several periods of indulgence granted, but there has been no waiver of the last default on the part of the owner, and no alteration of the builder's position to his prejudice, the owner may be entitled to re-enter and seize the materials. (t)

Default at successive periods.

(7) RESTRAINING A FORFEITURE.

When the building contract is one where, if the employer was wrong in resuming possession in exercise of a power contained in the contract, the builder could be amply compensated in damages, whereas if the builder were allowed to continue the work, the

Injunction by builder, restraining forfeiture.

(q) See *Doe d. Kensington v. Brindley*, 12 Moo. C. P. 37; *Marsden v. Sambell*, *supra*. *Ex parte Newitt, In re Garrud*, L. R. 16 Ch. D. 522, 531; *Artificial Drainage Co. v. Rathangan Drainage Bd.*, 6 L. R. (Ir.) 515.

(r) *Hunt v. Bishop*, 8 Ex. 675. *See quare*, where there is no knowledge actual or implied; *Hunt v. Remnant*, 9 Ex. 635. See 23 & 24 Viet. c. 38, s. 6, as to an actual waiver not operating as general waiver in leases.

(s) *Graham v. The Commissioners of Works*, Appendix, p. 670.

(t) *Stevens v. Taylor*, 2 F. & F. 419. See *post*, Chap. XIII., as to property in building materials.

Court could not enforce specific performance of the contract in order to compel the completion of the works according to the terms of such contract, the builder will not generally be entitled to an interlocutory injunction. (*u*)

(*u*) *Garrett v. Banstead and Epsom Downs Ry. Co.*, 4 De G. J. & S. 462; *Jennings v. Brighton, etc., Sewers Bd.*, 4 De G. J. & S. 735 n. But see *Garrett v. Salisbury and Dorset Junction Ry. Co.*, L. R. 2 Eq. 358.

CHAPTER XII.

DEATH OR BANKRUPTCY OF BUILDER OR EMPLOYER.

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SECT. I.—DEATH OF BUILDER.

THE contract of the architect is a personal contract, which can only be performed during his lifetime, and is subject to the implied condition of his continuing alive and in health, and is revoked by his death or incapacity from illness. (a) But this is not the case with the contract of the builder, as, upon his death, the personal representatives, with the exception mentioned below, become entitled to the benefit of the contract of the deceased remaining incomplete at the death, and are entitled to complete it, and recover the value for the benefit of the estate. On the other hand, the personal representatives, if they have sufficient assets, are bound to carry out the work, although they are not mentioned in the contract, (b) or they must pay damages out of the assets. (c)

In the case of an ordinary building contract.

(a) See *ante*, p. 74.

(b) See *Wentworth v. Cock*, 10 A. & E. 42. There, in an action against an administrator for refusing to receive slate ordered by the intestate, the Court held that the action would lie, and that the legal personal representative must receive and pay for the goods so ordered.

(c) *Marshall v. Broadhurst*, 1 C. & J. 403; *Siloni v. Kirkman*, 1 M. & W. 418; *Quick v. Ludburrow*, 3 Bulstr. 30, by Coke, C.J. By the French law the contract is determined by death of the architect or builder; but the owner must pay a proportion of the agreed price to the legal personal representative for the work done and materials used, if they can be of use to him. "Le contrat de louage d'ouvrage est dissous par la mort de l'ouvrier, de l'architecte ou entrepreneur." Code Civil, Liv. III. tit. viii. 1795. "Mais le propriétaire est tenu de payer en proportion du prix porté par la convention, à leur succession, la valeur

Action by
executors.

In *Marshall v. Broadhurst* (d) a contractor agreed to do certain work, and died before the work was begun, and his executors did the work, using the materials; it was held that the executors, in their representative character, could recover for work and labour done and materials found. And the executors will be liable even where the heir is named, and the executors are not named, in the contract. (e)

Where per-
sonal skill
required.

But if the agreement with the contractor be such as to require personal skill or taste of an exceptional description, it may be dissolved by his death. The interpretation of contracts of this kind must necessarily depend upon the nature of the work, and the particular circumstances of each case. Thus a contract to build a lighthouse was held to be discharged by the death of the contractor. (f)

SECT. II.—DEATH OF EMPLOYER.

If, after a building contract has been entered into, the employer die before it is completed, the rights and liabilities of his personal representatives will be generally the same as those just referred to in the case of the death of the contractor. The personal representatives of the employer, if they have sufficient assets, are bound to pay any sum due to the contractor, and to permit the latter to complete the contract, or they must pay damages. On the other hand, they are entitled to bring any action against the contractor, and to recover damages, if he does not carry out his contract. (g) The case of *Cooper v. Jarman* (h) further illustrates the rules above stated; there, a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and, having died intestate before the house was finished, it was held that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. Where a testator had expended a large sum in building on land of his own, and his executors, at the request of the tenant for life, on whom the land was settled by the testator's will, laid out further sums in

des ouvrages faits et celle des matériaux préparés, lors seulement que ces travaux ou ces matériaux peuvent lui être utiles." *Ib.*, 1796. See Pothier, *Louage*, 456.

(d) 1 C. & J. 403.

(e) *Williams v. Burrell*, 1 C. B. 402. As to contracts under seal, see Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 59.

(f) See case cited by Patteson, J., in *Wentworth v. Cock*, 10 A. & E. 45; and see *Jueger v. Walker*, 77 L. T. 180.

(g) *Wentworth v. Cock*, *supra*.

(h) L. R. 3 Eq. 98.

completing the buildings, it was held to be an unauthorised investment by the executors, but that the expenditure was in the nature of salvage, and there was a lien on the land for the money. (i)

SECT. III.—BANKRUPTCY OF BUILDER.

(1) EFFECT OF BANKRUPTCY ON BUILDING CONTRACTS.

The contract of the builder is not, in general, a personal contract, and, if it is unexecuted at the time of his bankruptcy, the right of the trustee to sue in respect of it will depend on his ability to perform what remains to be done on the bankrupt's part; (k) as a rule, therefore, it would vest in the trustee.

Contracts in which the personal skill of the bankrupt forms a material part of the consideration do not pass to his trustee in bankruptcy; yet, if the work is completed according to the contract by the bankrupt on behalf of the estate, or if completion by the trustee were accepted by the other party, the trustee would be entitled to recover the contract price. (l) Having regard, however, to the provisions of the Bankruptcy Act, 1883, which expressly bind the bankrupt to aid to the utmost of his power in the realisation of his property, and subject him to punishment if he fail to do so, (m) it would seem that the trustee will be entitled to require the bankrupt to give his aid in completing any contract unexecuted at the time of his bankruptcy.

As the trustee, if he adopt the contract of the bankrupt to build, will be compelled to perform all that the bankrupt was bound to do, so, on the other hand, he will be entitled to enforce any claims with respect to the contract. And rights of action for the recovery of damages for the breach of any contract, whether liquidated or unliquidated, provided the injury affects the property of the bankrupt, will, as a general rule, pass to the trustee. (n) Personal actions for breaches of contract wholly unconnected with the debtor's property do not pass to the trustee. (o)

Performance by trustee of contracts requiring personal skill.

Rights of trustee adopting building contract.

(i) *Ferguson v. Ferguson*, 17 L. R. (Ir.) 552.

(k) *Gibson v. Carruthers*, 8 M. & W. 321. See *Tooth v. Hallett*, L. R. 4 Ch. 242; *Drew v. Josolyne*, 18 Q. B. B. 590, as to the trustee of a creditor's deed, advancing his own moneys to complete the building of property mortgaged after time for completion, having priority over the mortgagee, *ante*, p. 130; and see the next chapter as to vesting and seizure of materials in and by employer.

(l) *Whitmore v. Gilmour*, 12 M. & W. 810. See *Knight v. Burgess*, 33 L. J. Ch. 727; *Jackson v. Swarbrick*, W. N. 1870, p. 133. See *supra* as to such contracts on death of builder.

(m) Bankruptcy Act, 1883, s. 21, and s. 23.

(n) *Wright v. Fairfield*, 2 B. & Ad. 727; *Porter v. Forley*, 9 King. 93.

(o) *Beckham v. Drake*, 2 H. L. C. 579.

Assignment
of future
instalments.

An equitable assignment by a builder of future contingent receipts of his business is inoperative, as regards receipts accruing after the commencement of his bankruptcy, as against the title of the trustee. (*p*) But this case must be distinguished from an assignment of money which the bankrupt has already earned. That which has been earned is in the nature of property which can be validly assigned as against the trustee in the bankruptcy of the assignor, though it does not become payable until after the commencement of the bankruptcy; that which has not been earned cannot be so assigned.

Assignment
"out of in-
stalments
due."

For example, a person entered into a contract to erect a building, the price for which was to be paid in certain specified instalments. At a time when a large part of the work had been done, and a part of the price, much less than the value of the work done, had been paid to the builder, he wrote a letter to the employers requesting them to pay to M. (a creditor of the builder) £129 'out of the instalment due to me' on delivery of work. The builder afterwards became bankrupt, and the trustee in the bankruptcy completed the work, and as the instalment had already been earned, at least to a greater extent than £129, it was held that the assignee was entitled as against the trustee. (*q*)

Drew v. Josolyne (*r*) is a somewhat similar case, where it was held that, in the absence of anything to show that the building owners had exercised a power (which the contract conferred on them) of taking the work out of the contractors' hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; and that the assignment held good as against the trustee.

(2) CLAUSES IN BUILDING CONTRACTS PROVIDING FOR BANKRUPTCY.

Conditions, however, are usually inserted in building contracts providing that, in case of the bankruptcy of the builder, or of an assignment by him for the benefit of his creditors, it should be

(*p*) *Ex parte Nichols, Re Jones*, 22 Ch. D. 782. As to a charge on moneys payable under a contract, and the winding-up of the contracting company, see *Re Asphalte Wood Pavement Co.*, 26 Ch. D. 624, varied, on appeal, W. N. 1885, p. 35. See *ante*, p. 130, *et seq.*

(*q*) *Ex parte Moss, Re Toward*, 14 Q. B. D. 310, distinguishing *Ex parte Nicholls*, *supra*, and *Tooth v. Hallett*, L. R. 4 Ch. 242.

(*r*) 18 Q. B. D. 590. Where the lessee, after assigning, becomes bankrupt, the lease is not determined: *Smith v. Gronow*, [1891] 2 Q. B. D. 394.

lawful for the employer (generally by his architect) to enter and take possession of the premises, (s) and to get the work done by other builders, as he should think fit; and also that the builder and his trustee should, under these circumstances, forfeit all claim to further payment, except to such balance (if any) as might remain out of the contract price, after the completion of the work by such other builders or workmen; but without prejudice to any remedy which the employer might have against the builder for breach of contract.

Where a deposit is paid on entering into a contract for the purchase of real estate which contains no forfeiture clause, and the purchaser fails to complete, the deposit cannot be recovered. (t) Forfeiture of a deposit.

The same principle seems to apply to building contracts which contain a forfeiture clause. If a man makes a contract under which he hands over his property to the person with whom he is contracting in such a way that it is to be treated as security for the due performance of the contract, and then he himself makes default in performing the contract, it is not possible for him to say that he is entitled to recover such property when he is not able to show that he has performed his part of the contract. (u) Forfeiture of materials.

(3) EFFECT OF BANKRUPTCY ON BUILDING LEASES.

Building leases of a bankrupt builder vest, under the Bankruptcy Act, 1883, (v) in the trustee on his appointment. So, also, the benefit of the bankrupt's option to take a building lease passes to his trustee. (x) Although the trustee has not taken actual possession, or done any act amounting to an acceptance of the lease, if he does not exercise his right of disclaimer he becomes personally liable for the rent accruing due after his appointment, and for any breach of the covenants of the building lease since his appointment, but he has a right to be indemnified out of the assets. (y) The liability probably only extends to such covenants as run with the land. (z)

(s) See the Precedents, p. 376, *post*, and see *post*, p. 173, as to plant and materials upon such re-entry. As to detention of tools, see the Scotch case of *Kerr v. Dundee Gas Co.* (1861), 23 Ct. of Sess. Cas. (2nd ser.) R. 243.

(t) *Ex parte Darrell*, L. R. 10 Ch. 512, *ubi supra*.

(u) *Per Farwell, J.*, in *Hart v. Porthgair Harbour Co., Ltd.* 1903, 1 Ch. 690, at pp. 695, 696.

(v) 46 & 47 Vict. c. 52.

(x) *Buckland v. Papillon*, L. R. 2 Ch. 67.

(y) *Titterton v. Cooper*, 9 Q. B. D. 473. Trustee can assign to a pauper, although the lease contain a covenant not to assign without leave: *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353; *Hopkinson v. Lovering*, 11 Q. B. D. 92; *Onslow v. Corrie*, 2 Madd. 330.

(z) *Wilson v. Wallani*, 5 Ex. D. 155; *Ex parte Dressler, Re Solomon*, 9 Ch. D. 252. See *post*, Chap. XXI.

Cesser of
term on
bankruptcy
of builder.

It is not uncommon in building leases to limit the term so that it ceases on the bankruptcy of the builder. (a) But the effect of clauses of cesser or forfeiture on bankruptcy must now be considered in connection with the provisions of sect. 14 of the Conveyancing Act, 1881, and sect. 2, sub-sect. (2), of the Conveyancing Act, 1882.

Effect of the
Convey-
ancing Acts,
1881 and
1882.

By the last-mentioned sub-section: "Sub-sect. (6) of sect. 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-sect. (6) shall cease to be applicable thereto."

By sub-sect. (3), sub-sect. (2) of this section is not to apply to certain specified classes of leases, which do not, however, appear to include building leases.

Sect. 14, sub-sect. (6), of the Act of 1881 is as follows:—

"This section does not extend (1) to a covenant or condition against the assigning, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest."

By sect. 14, sub-sect. (5): "For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach."

Sect. 14 of the Act of 1881 (which as a whole is expressed in terms singularly inappropriate to forfeiture or cesser upon bankruptcy) imposed certain restrictions upon, and granted certain relief against forfeiture of leases. It is submitted that the net result of this remarkably clumsy legislation, so far as concerns the bankruptcy of the lessee, is, that whether the lease contains a clause of forfeiture, or a condition of re-entry upon bankruptcy, or the term is limited to continue only until bankruptcy and then to cease, in any such case the trustee in bankruptcy is given one year in which to sell the lease if he can, and that if he can succeed

(a) *Doe v. Carter*, 8 T. R. 57; *Doe v. Clarke*, 8 East, 185. But see *Doe v. d. Lloyd v. Powell*, 5 B. & C. 308. For a precedent of such a clause, in an agreement for a lease, see *post*, p. 410.

within that period in finding a purchaser therefor, the forfeiture can be relieved against, but not otherwise.

(4) DISCLAIMER OF ONEROUS CONTRACTS OR LEASES.

In the event of the bankruptcy of the builder, the trustee may disclaim an unexecuted contract, if he thinks it would not be beneficial to the estate; he may do so in express terms, and the employer would then be discharged. (b)

If a building contract or building lease be found not to be beneficial to the estate, the trustee can disclaim, under sect. 55 of the Bankruptcy Act, 1883, (c) which enacts that where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, or of unprofitable contracts, the trustee, notwithstanding that he has endeavoured to sell, or has taken possession of, the property, or exercised any act of ownership in relation thereto, but subject to the provisions of that section, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee, disclaim the property. (d) Provided that, where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within twelve months after he first became aware thereof.

The bankrupt's interest in an agreement for a lease is in the nature of land burdened with onerous covenants, and can be disclaimed under this section. (e) But apparently not without leave of the Court. It was held, under the Act of 1869, that freehold property, if burdened with onerous covenants, might be disclaimed, the legal estate reverting apparently to the Crown. (f)

But the trustee is not entitled to disclaim property in pursuance of the above section in any case where an application in writing has been made to the trustee by any person interested in the property, requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he

(b) *Gibson v. Carruthers*, *supra*; *Lawrence v. Knowles*, 5 Bing. N. C. 399. See *Morgan v. Itain*, L. R. 10 C. P. 15; *Ex parte Chalmers*, L. R. 8 Ch. 289.

(c) 46 & 47 Vict. c. 52, as amended by the Bankruptcy Act, 1890, s. 13.

(d) See *Wilson v. Wallani*, L. R. 5 Ex. D. 155, as to the necessary signature to the disclaimer.

(e) *Re Maughan, Ex parte Monkhouse*, 14 Q. B. D. 956.

(f) *Re Mercer and Moore*, 14 Ch. D. 287.

disclaims the property or not. And, in the case of a contract, if the trustee, after such application, does not within the said period, or extended period, disclaim the contract, he is deemed to have adopted it. (g) A trustee cannot disclaim a contract to sell leaseholds unless he disclaims the lease itself; (h) and where a trustee purported to disclaim such a contract, without disclaiming the lease, the disclaimer was held a nullity, and specific performance was ordered. (i)

Power of
Court to
rescind
contract.

It should, however, be observed that the Court may, on the application of any person who is, as against the trustee, entitled to the benefit, or subject to the burden, of a contract made with the bankrupt, make an order, rescinding the contract on such terms as to payment, by or to either party, of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy. (k)

Disclaimer
of building
leases with
leave of
Court.

A trustee is not entitled to disclaim a lease without the leave of the Court, except as follows—viz.: Leave to disclaim is not necessary

(1) where the bankrupt has not sub-let the demised premises, or any part thereof, or created a mortgage or charge thereon, and

(a) The rent reserved and the real value of the property leased as ascertained by the property tax assessment are less than £20 per annum, or

(b) The estate is administered under sect. 121 of the Act of 1883 (small bankruptcies), or

(c) The trustee serves the lessor with notice of intention to disclaim, and the lessor does not, within seven days after the receipt of such notice, give notice to the trustee requiring the matter to be brought before the Court;

(2) Where the bankrupt has sub-let the demised premises, or created a mortgage or charge upon the lease, and the trustee serves the lessor, and the sub-lessee, or the mortgagees with notice of his intention to disclaim, and neither lessor, nor sub-lessee, nor the mortgagees, nor any of them, within fourteen days after receipt

(g) 46 & 47 Vict. c. 52, s. 55 (4). As to extension of time, see *Ex parte Lovering, Re Jones*, L. R. 9 Ch. 586; *Ex parte Harris, Re Richardson*, 16 Ch. D. 613; *Banner v. Johnston*, L. R. 5 H. L. 157. As to proof of delivery of application, see *Reed v. Harvey*, 5 Q. B. D. 184.

(h) *In re Bastable* (1901), 2 K. B. 518.

(i) *Pearce v. Bastable's Trustees* (1901), 2 Ch. 122.

(k) 46 & 47 Vict. c. 52, s. 55 (5). *Re Sneezum, Ex parte Davis*, 3 C. D. 463.

of such notice require or requires the matter to be brought before the Court. (*l*)

But in cases of disclaimer without leave, the Court has no power to grant compensation to the landlord. (*m*) The Court may, before or on granting leave to disclaim, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just. (*n*) If the lessor wishes to have terms imposed on the trustee, he should apply, when the order is made, for a stay of proceedings thereunder. (*o*) When the lessor has been kept out of possession of the property, and the trustee's occupation has either in fact produced a benefit, or was contemplated as likely to produce a benefit to the bankrupt's estate, the Court will order compensation to be paid to him. (*p*)

Disclaimer
without
leave.

(5) OPERATION OF DISCLAIMER.

The disclaimer operates to determine, as from the date of the disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and also discharges the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him, but does not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person. (*q*)

"The intention of the legislature in cases of disclaimer by a trustee in bankruptcy clearly appears to have been, while they were providing for the relief of the trustee from liability in respect of onerous obligations of the bankrupt, including the obligations arising under a lease, to do so with as little disturbance as might

Object of
disclaimer.

l Bankruptcy Rules of 1886, 1890, etc., rule 320. See *Baldwin's Bankruptcy* (9th ed.), pp. 328, 898.

m *Re Sanwell, Ex parte Zerfass*, 14 Q. B. D. 960. But the landlord may be a person injured, and as such, entitled to compensation. See p. 168, *post*.

n 46 & 47 Vict. c. 52, s. 55 (3). See *Ex parte Ladbury, Re Turner*, 17 Ch. D. 532. As to landlord's power to put an end to possession at any time by giving notices, see s. 55 (4).

o *Ex parte Sadler, Re Hawes*, 19 Ch. D. 122. As to appeal from discretion, see Bankruptcy rule 129; *Ex parte East and West India Dock Co., Re Clarke*, 17 Ch. D. 759; *Ex parte Edmonds, Re Tipping*, 48 L. T. 77; *Ex parte Arnal, Re Wilton*, 24 Ch. D. 26.

p *Ex parte Arnal, Re Wilton*, 24 Ch. D. 26; *Ex parte Izard, Re Bushell*, 23 Ch. D. 115; *Ex parte Isherwood, Re Knight*, 22 Ch. D. 384.

q 46 & 47 Vict. c. 52, s. 55 (2).

be of the rights and liabilities of third persons by reason of the disclaimer.” (r)

Liability for rent.

It has been held that, in the case of a lease, the liability of the lessee for rent is determined as from the date of the disclaimer, so that one who had guaranteed the payment by a lessee of rent which might from time to time be in arrears for twenty-one days was held discharged by a disclaimer of the lease. (s)

Where builder has mortgaged lease or sub-let.

A legal mortgage of the building lease, or a charge by way of equitable mortgage, subject to the mortgagee being excluded under the provisions of sect. 55 of the Bankruptcy Act, 1883, if the mortgagee decline to take a vesting order, will not be affected if the trustee disclaims. (t) Nor is a sub-lease by a bankrupt builder, who is lessee, destroyed by a disclaimer of his trustee; but this, too, is subject to the provisions of sect. 55. Although there may be no direct liability by the sub-lessee on the covenants of the original building lease, yet the lessor can indirectly enforce compliance with those covenants through the power to distrain, or to re-enter for breaches of covenants in that lease. (u)

Court can make a vesting order where necessary.

The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability, not discharged by the Act, in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein is to vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

Vesting order on terms.

But where the property disclaimed is of a leasehold nature, the Court is not to make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was

(r) *Per* Vaughan Williams, L.J., in *In re Carter Ellis, Ex parte Savill* (1905), 1 K. B. 735, at p. 742.

(s) *Stacey v. Hill* (1901), 1 Q. B. 660.

(t) *Ex parte Buxton, Re Muller*, 15 Ch. D. 289; *Ex parte Walton, Re Levy*, 17 Ch. D. 746, at p. 753; *Doe v. Pyke*, 5 M. & S. 146. As to vesting the legal estate, see *infra*.

(u) See *Ex parte Walton, Re Levy*, 17 Ch. D. 746; *Smalley v. Harding*, 7 Q. B. D. 524. Where the bankrupt is assignee, see *Hill v. East and West India Dock Co.*, 9 App. Cas. 448; *Harding v. Preece*, 9 Q. B. D. 281.

subject to under the lease in respect of the property at the date when the bankruptcy petition was filed. And any mortgagee or under-lessee declining to accept a vesting order upon such terms will be excluded from all interest in and security upon the property, and if there be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court has power to vest the bankrupt's estate and interest in the property in any person liable, either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt. (w)

But, by sect. 13 of the Bankruptcy Act, 1890, the Court may, if it thinks fit, modify the terms of sub-sect. 6 of sect. 55 of the Act of 1883, so as to make the person in whose favour the vesting order may be made, subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed; and (if the case so requires) as if the lease had included only the property comprised in the vesting order.

Liability of person in whom property vested.

The use of the power given by this section will prevent the difficulty arising, which was adverted to in *Re Finley, Ex parte Clothworkers' Company*, (x) whether a mortgagee taking a vesting order simply under sub-sect. 6 would become liable to the same extent as if he had been the original lessee instead of the bankrupt, or only as if he were assignee of the original lease.

Where leaseholds are disclaimed which are mortgaged by sub-demise, the landlord may have a vesting order, vesting the property in the sub-lessee, and, if the sub-lessee decline to accept such an order, he will be excluded from all interest in the property and the landlord may have an order for possession. (y) This power may be exercised although there is a lessee who still remains liable to the lessor upon the covenants in the lease. (z)

Disclaimer of leases mortgaged by sub-demise.

A mortgagee who does not appear on the application for leave

(w) 46 & 47 Vict. c. 52, s. 55 (6). See *Re Mercer and Moore*, 14 Ch. D. 257.

(x) 21 Q. B. D. 475, followed in *Re Baker, Ex parte Lupton* (1901), 2 K. B. 628. See also *Stacey v. Hill* (1901), 1 K. B. 660; *In re Carter and Ellis, Ex parte Savill* (1905), 1 K. B. 735; *In re Walker* (1895), 64 L. J. Q. B. 783. From these cases may be gathered the considerations by which the discretion of the Court will be guided.

(y) *Re Cock, Ex parte Shilson*, 20 Q. B. D. 342, followed in *Re Baker, supra*; *Re Finley, supra*.

z *In re Baker, ubi supra*, per Collins, L.J. (1901), 2 K. B. 628, at p. 636.

to disclaim will be excluded from all interest in and security on the property, unless he elect to take a vesting order. (a)

Proof for
damages
caused by
disclaimer.

Any person injured by the operation of a disclaimer will be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy. (b)

For example, if the property disclaimed were an unprofitable building contract, the measure of damages would be the difference between the sum for which the bankrupt builder had undertaken to do the work, and the sum for which some one else could be procured to undertake to do it. And, in addition, if it were a lease, the measure would be the difference between the rent which the bankrupt actually paid, and the rent which could then be obtained for the same property. (c)

(6) BUILDER'S BANKRUPTCY AND RIGHTS OF SUB-CONTRACTORS.

Where a builder is at liberty, in accordance with the terms of his contract, to employ sub-contractors to execute portions of the work, the bankruptcy of the builder may have very important consequences as affecting the rights and liabilities of the sub-contractors.

A recent case (d) illustrates the advantage and importance to sub-contractors of the insertion in the original building contract of a special clause for their protection. In that case a district council entered into a contract with a contractor for the construction of certain sewage works. The contract provided that certain machinery for the works was to be supplied to the contractor by certain specified firms, and (by sect. 54) that: "If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery he shall have power, if he thinks fit, to order direct payment to them." Upon these terms the contractor commenced the work. On October 12, 1904, he was adjudicated bankrupt, and the work was eventually completed by his trustee in bankruptcy on October 24. At the date of the receiving order there

(a) *Re Parker, Ex parte Turquand*, 14 Q. B. D. 405.

(b) 46 & 47 Vict. c. 52, s. 55 (7).

(c) See *Ex parte Llynvi Coal, etc., Co., Re Hyde*, L. R. 7 Ch. 28; *Ex parte Blake, Re McEwan*, 11 Ch. D. 572. As to forfeiture of deposit by trustee who disclaims, see *Ex parte Barrell*, 33 L. T. 115. As to proof by an under-lessee, see *Ex parte Walton, Re Levy*, 17 C. D. 746.

(d) *In re Wilkinson, Ex parte Fowler* (1905), 2 K. B. 713.

was a sum of £836 8s. 9d. due to the machinery firms. Up to the date of the bankruptcy the engineer had not exercised his powers under sect. 54; but in February and April, 1905, after stating that he had reasonable cause to believe that the contractors were unduly delaying payment, he directed payment to these firms of the above mentioned sum, such payment to be made direct by the district council. It was held that payment had been unduly delayed within the meaning of the clause, and that, notwithstanding the bankruptcy, the engineer had power to direct the payments to be made to the machinery firms direct. Dealing with clause 54, Bigham, J., said: (e) "I think it means that, if the persons supplying machinery to the contractor for the purpose of the contract are not promptly and properly paid by him, they can apply to the engineer, and then it shall be competent for the engineer to intervene, and, by a proper certificate given in that behalf, to require the council to pay to the machinery firms the amount of their accounts directly—that is to say, not through the hands of the contractor at all, but the money is to be paid directly by the council to the machinery firms." (g)

SECT. IV.—BANKRUPTCY OF EMPLOYER.

The principles above mentioned will be equally applicable to the case of the employer's bankruptcy. And if it is stipulated that, in case of a breach of the contract to build, a sum of money shall be paid by way of penalty to the employer; and a breach takes place before his bankruptcy, the right of action for the penalty will pass to the trustee. (f)

In large contracts provision is also in some cases made for the employer's failure, the agreement stipulating that, in such an event, the contractor is to be at liberty to suspend the works, and is not to be bound to proceed further with the contract. (g)

(e) At p. 720 in the L. R.

(f) *Beckham v. Drake*, 2 H. L. C. 579.

(g) See F. VIII., Cl. 31, *post*, p. 390.

CHAPTER XIII.

PROPERTY IN BUILDING MATERIALS.

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SECT. I.—PRELIMINARY.

Property in
and forfeiture
of building
materials.

THE preceding chapter on the bankruptcy of the builder leads us to the consideration of the present subject. The question whether conditions in building contracts relating to the property in materials, etc., which may be brought on the ground during the progress of the building, or providing for their forfeiture in certain events, can be upheld as against the trustee, when the builder has become bankrupt, depends principally on the original intention of the parties, to be collected from the terms of the agreement.

SECT. II.—CLAUSES PROVIDING FOR THE TRANSFER OF PROPERTY IN BUILDING MATERIALS.

Whether
conditions
operate as
a present
assignment
or only as
a licence
to take
possession.

It may be said, as a general rule, that if, by its terms, it appears that the contract is intended actually to transfer specific materials immediately they are brought upon the building ground, and the effect of the contract is to give the employer, from the very time when the contract was entered into, an interest in the building materials, then, if for valuable consideration, it is, subject to the reputed ownership clause, (a) good as against the trustee or

(a) 46 & 47 Vict. c. 52, s. 44. A builder was a trader within the definition of the Bankruptcy Act, 1869. The present Act, it is to be regretted, contains no definition of a "trade or business." *Ex parte Newitt*, 16 C. D. 522.

judgment creditor. (b) In order that a mere contract may amount to an assignment, it must purport to confer an interest in the future chattels immediately, by its own force, and without the necessity of any further act on the part of the assignee upon the future chattels coming into existence; and, therefore, an assignment of existing chattels coupled with words which amount to a mere licence to seize after acquired property, will not be construed as an assignment of the latter; (c) though, if possession is actually taken of the property when it comes into existence, a legal interest is acquired. (d)

If there is a mere licence to seize, and no interest in, the building materials, the licence cannot be exercised to the prejudice of any person who has acquired an interest in the materials in the interval before seizure. (e)

Mere licence to seize.

It is important, therefore, for the protection of the landowner, that the building contract should contain a clause to the effect that all building materials brought upon the ground shall immediately become his property. (f) Under such a clause the interest obtained by the landlord is a legal interest, not an equitable one, and consequently not within the Bills of Sale Acts as being "a right in equity to any chattels under an agreement." Down to the time when the building materials are brought upon the landlord's premises there is no contract relating to any specific goods at all, and the moment the goods are brought on the premises the property in them passes *in law*. (g)

Importance of the clause.

Such clauses are put in for the purpose, not merely of enabling the contract to be performed, but also as a due security for its performance. They are not mere machinery to enable the building owners, either themselves or by another contractor, to complete the performance of the contract, but they are also a security for

General effect of such clauses.

(b) *Joseph v. Lyons*, 15 Q. B. D. 280; *Hallas v. Robinson*, 15 Q. B. D. 288; but see *Collyer v. Isaacs*, 19 Ch. D. 312, as to chattels acquired after discharge.

(c) *Reeve v. Whitmore*, 33 L. J. Ch. 63.

(d) *Morris v. Delobel-Filipo*, [1892] 2 Ch. 352; *Ex parte Hubbard*, 17 Q. B. D. 690.

(e) The distinction between a mere licence to take possession and the creation of an interest will be found well defined in the cases of *Holroyd v. Marshall*, 33 L. J. Ch. 193; *Carr v. Allatt*, 27 L. J. Ex. 385. Per Lord Westbury, C., in *Reeve v. Whitmore*, 33 L. J. Ch. 63. And see Bar. Mar. R. 14. "Licet dispositio de interesse futuro sit utilis, tamen potest fieri declaratio procedens, quæ sortiatur effectum, interveniente novo actu."

(f) See *Reeves v. Barlow*, 12 Q. B. D. 436, *supra*. As to right of lien and power of sale being lost by a substituted contract, see *Hunt v. South-Eastern Ry. Co.*, 45 L. J. C. P. 87. See *ante*, p. 140.

(g) *Reeves v. Barlow*, 12 Q. B. D. 436; *Lilake v. Izard*, 16 W. R. 108.

the building owners that the work shall be performed; and the building owners are entitled to avail themselves of that security if, by the default of the contractor, the work is not performed at all. (*h*)

Materials
attached to
the premises.

Whether the nature of the interest of the landlord is also legal where the clause merely provides that the materials brought on the land shall be considered as immediately attached to and belonging to the premises, does not appear to have been decided. The question arose in *Brown v. Bateman*, (*i*) but the Court abstained from giving a decision, it being sufficient for that case to decide that there was, at all events, an equitable interest. It is submitted that the interest of the landlord under this clause also is legal, and not equitable and not within the Bills of Sale Acts.

The case of *Becston v. Marriott* (*k*) may, at first, appear to be somewhat in conflict with *Brown v. Bateman*, but, bearing in mind the fact that, in the construction of conditions of this description, the Court always looks at the terms of each particular agreement to find the intention of the parties, the reason for the decision seems sufficiently clear. In this case the contract not only provided that the materials brought upon the ground should immediately become the absolute property of the employer, and that the contractor should have no property in them, except the right of using them on the land for the purpose of the works; but also that, if he should duly complete his contract, the employer would give to the contractor, as part of his payment, the unconsumed materials; and that, if the employer should use the materials, instead of the contractor, he should compensate the latter in respect of them. It was held that the materials were not, by the terms of this contract, so absolutely the property of the employer as to be seizable by the sheriff under an execution upon a judgment against the employer.

SECT. III.—FORFEITURE OF MATERIALS ON BANKRUPTCY.

Stipulation
providing
for forfeiture

A simple stipulation providing that, if a builder become bankrupt, certain plant and materials, which were his property up to

(*h*) *Per* Farwell, J., in *Hart v. Porthgain Harbour Co., Ltd.* (1903), 1 Ch. 690, at p. 696.

(*i*) L. R. 2 C. P. 272. As to *Belding v. Read*, 3 H. & C. 955, see *per* Bowen, L.J., in *Reeves v. Barlow*, *supra*. See also *In re Keen, Ex parte Collins* (1902), 1 K. B. 555, *infra*, p. 176.

(*k*) 9 Jur. N. S. 960. See *Hawthorn v. Newcastle Ry. Co.*, 3 Q. B. 734; *In re Winter, Ex parte Bolland*, 8 Ch. D. 225.

the date of the bankruptcy, should be forfeited to the employer, and be taken away from his creditors, is void as being a violation of the policy of the bankrupt law. (l) But a power to seize the materials, in case the builders make default in, or delay the completion of the works, may be exercised on such default or delay occurring, although the builders have become bankrupt. Thus in *Ex parte Newitt*, (m) under a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land and expel the builder, and that on such re-entry all the materials then in and about the premises should be forfeited to, and become the property of, the landowner as and for liquidated damages, it was held that, the interest of the builder in the materials being a defeasible one, the right of the landowner to seize was not defeated by the mere fact of the commission of an act of bankruptcy by the builder before the seizure was made. The trustee in bankruptcy of the builder takes subject to the right of the landowner under the agreement. As a transfer for value of the materials by the builder to a third party would not have defeated the rights of the landowner, the bankruptcy of the builder could not do so. It will be observed that the condition precedent to the power was not *bankruptcy* but *default*.

of materials
in case of
builder's
bankruptcy.

Defeasible
interest and
act of bank-
ruptcy prior
to seizure.

In *Ex parte Barter, Re Walker* (n) the subject-matter was a contract to build a ship, and the case is of importance from the fact that the contract contained both a "vesting clause," vesting materials in the buyer after payment of the first instalment of the price, and a power to seize such materials, and use the builders' yard, plant, and tools in case the builders became bankrupt, or made default in performance of the contract. The builders became bankrupt, and the buyers entered and seized the materials, and used the builders' plant, etc., in completion of the ship. It was held that the *materials* already belonged to the buyers under the

Effect of a
vesting
clause.

(l) *Higginbotham v. Holme*, 19 Ves. 83; *Ex parte Mackay*, L. R. 8 Ch. 643; *Ex parte Williams*, 7 Ch. D. 138, followed in *In re Powell, Powell v. Powell*, 20 T. L. R. 374; *Ex parte Jay, In re Harrison*, 14 Ch. D. 19, distinguishing *Brown v. Bateman*, *supra*; and *In re Waugh, Ex parte Dickinson*, 4 C. D. 524, *infra*. See also *Ex parte Barter, Re Walker*, 26 Ch. D. 510.

(m) *Ex parte Newitt, In re Garrud*, 16 Ch. D. 522; *Re Waugh, Ex parte Dickinson*, 4 C. D. 524. See *Hawthorn v. Newcastle Ry. Co.*, 3 Q. B. 734; *In re Winter, Ex parte Holland*, 8 C. D. 225; *Krehl v. Great Central Gas Co.*, L. R. 5 Ex. 289. Compare *Ex parte Attwater, Re Turner*, 5 C. D. 27; *Girrell v. Salisbury and Dorset Junction Ry. Co.*, L. R. 2 Eq. 358.

(n) 26 C. D. 510. The headnote in 26 Ch. D. 510 does not set out the whole of the decision.

vesting clause, the first instalment having been paid, and that they had only seized their own property, which they were entitled to do; but as to the user of the builders' *plant, etc.*, the power to do this was held to be bad, as a fraud on the bankruptcy laws. (*o*)

The result of the cases may be summed up as follows:—

A. *Without a Vesting Clause*.—Power to seize or use materials on bankruptcy—bad; see *ante*, p. 173. Power to seize or use for default—good, may be exercised although the builders have previously become bankrupt; see *ante*, p. 173.

B. *With Vesting Clause*.—Power to seize, good—whether exercisable on default or bankruptcy. In any case the employer only seizes his own property. The words “become bankrupt” mean “be adjudicated bankrupt.” (*p*)

It may be here added that, in *Ex parte Barter*, (*q*) the buyers attempted to justify their user of the builders' plant, on the ground that, although they, in fact, exercised the power when the builders became bankrupt, yet subsequently the builders had made default in performance of their contract; but it was held that, having seized for bankruptcy, they could not justify their seizure on the ground of subsequent default.

As to the effect of the reputed ownership clause (*r*) of the Bankruptcy Act on such cases, it does not apply to a case, such as *Ex parte Newitt*, (*s*) where there is no vesting clause, as until the employer seizes he is not the true owner of the materials. (*t*)

SECT. IV.—THE REPUTED OWNERSHIP CLAUSE.

In a former edition of this work it was submitted that where a builder delivers materials on his employer's land, such materials are not in the order and disposition of the builder as reputed owner. Goods in the order and disposition of a builder in his trade or business by the consent of the true owners, under such circumstances as to make the builder the reputed owner thereof, pass to the builder's trustee in bankruptcy. (*u*)

(*o*) See also as to user of materials, etc., *Hawthorn v. Newcastle Ry. Co.*, 3 Q. B. 734, *supra*; *Garrett v. Salisbury and Dorset Junction Ry. Co.*, L. R. 2 Eq. 358, *supra*.

(*p*) *In re Weibking, Ex parte Ward* (1902), 1 K. B. 713.

(*q*) *Supra*.

(*r*) As to which, see *infra*.

(*s*) *Supra*.

(*t*) *Ib.*

(*u*) Bankruptcy Act, 1883, s. 44.

According to Lord Redesdale (*w*) the order and disposition clause refers to chattels in the possession of a bankrupt, in his order and disposition, with the consent of the true owner; that means where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader, from the visible possession of property to which he was not entitled. But in the construction of the Act the nature of the possession has always been considered.

The principal subject for enquiry in every case arising under the section is whether the circumstances under which the property is in the bankrupt's possession, order, or disposition are such as to lead to a fair and reasonable inference, amongst persons likely to have dealings with him, that he is the owner? Accordingly, an established custom or usage of trade, whereby traders have in their possession goods of which they are not the owners, negatives the consent to the reputation of ownership, and prevents the application of the section.

Question arising in every case.

In order that goods and chattels, or an interest in goods and chattels, where such goods and chattels or such interest in them are not the bankrupt's, should pass to the trustee under the section, it is necessary that at the commencement of the bankruptcy—

- (1) The goods should be in the possession, order, or disposition of the bankrupt in his trade or business.
- (2) That they should be so under such circumstances that he is the reputed owner thereof.
- (3) Not only the possession, order, or disposition, but also the possession, order, or disposition under such circumstances as aforesaid, must be with the consent of the true owner. (*x*).

Accordingly, the order and disposition section can apply to building plant and materials only in cases where (*a*) the contract contains a clause by virtue of which they or some interest in them have vested in the building owner; or (*b*) by virtue of which the building owner, being entitled to seize them, has in fact seized them before the commencement of the bankruptcy.

When order and disposition section applies.

The section cannot, of course, have any application to materials which, at the commencement of the bankruptcy, have been built

(*w*) In *Jay v. Campbell*, 1 Sch. & Lef. 336.

(*x*) *Williams on Bankruptcy* (8th ed.), p. 221; and see *In re Keen, Ex parte Collins* (1902), 1 K. B. 555.

into, and thus form part of, the houses in course of erection. It is submitted that in considering the application of the section different considerations must apply to plant and materials, for a reputation of ownership may well extend to the former where it would not extend to the latter.

So far as materials are concerned, where the property has vested in the building owner before the commencement of the bankruptcy, it is submitted that where such materials are, at that time, upon the land of the building owner, they cannot be considered to be in the possession, order, or disposition of the builder, as reputed owner.

The point was not raised in *Ex parte Barter*, (y) where there was a vesting clause, and there appears to be no decision on the point under those circumstances; but it is submitted that, where a builder delivers materials on his employer's land, such materials are not in the order and disposition of the builder as reputed owner. (z)

Mutual credit
and set-off.

The "mutual credit and set-off section" (a) will not assist the employer under a "user" clause with respect to materials.

Where a building agreement provided that "all materials and plant brought upon the said premises are to be deemed to be annexed to the freehold" (a somewhat inept expression so far as plant was concerned), it was held that the loose plant and materials on the land at the date of a receiving order against the builder were in the reputed ownership of the builder, with the consent of the true owner (the building owner), and passed to the trustee in bankruptcy. (b)

"Reputed
ownership"
depends upon
all the
clauses in a
contract.

The question whether the reputed ownership clause applies to building materials depends, however, upon a careful consideration of all the clauses in the contract; and although the materials may be the property of the builder at the date of the receiving order, the terms of contract may be such as to prevent their passing to the trustee.

In *In re Keen, Ex parte Collins*, (c) a building contract made between a firm of builders and a school board provided that all plant, etc., brought to and left upon the ground by the contractor should be considered to be the property of the board, and the same should not on any account be removed or taken away by the

(y) 26 Ch. D. 510.

(z) *Seath v. Moore*, 11 A. C. 350, affirmed in *Reid v. Macbeth* (1904), A. C. 223.

(a) See now s. 38 of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52.

(b) *In re Weibking, Ex parte Ward* (1902), 1 K. B. 713.

(c) (1902), 1 K. B. 555.

contractor or by any other person without the express licence in writing of the architect, but that the board should not be answerable for any loss or damage which might happen to them. A further clause provided that, if the builders should delay the performance of their contract, the board might give the builders notice to proceed with the work, and that, in the event of their not doing so within seven days, the plant, etc., should be forfeited to the school board. The builders having become bankrupt, the board, subsequently to the commencement of the bankruptcy, gave notice to the builders and to their trustee to proceed with the work, and upon non-compliance they claimed that the plant and materials upon the premises were forfeited. The trustee, however, claimed these materials, relying upon the reputed ownership clause. It was argued on his behalf that the board had an equitable interest in the materials in the nature of a lien as security for the due carrying out of the contract, and that upon the authority of *Brown v. Baleman* (d) such an equitable interest was sufficient. It was held that the right to give notice to proceed with the work was not affected by the bankruptcy; that the board only had a contractual right to have the goods remain on the land for use by the builders in the construction of the building; that the "possession" of the builders was an ambiguous possession which they could not make use of to remove the goods from the premises, and that it could not be inferred that the board had consented to the builder's reputation of ownership. The board had merely consented to the goods remaining on the land for the very purpose for which they were placed there. The fact that the materials were not to be taken away without the consent of the board, and that the board expressly protected themselves against liability for loss or damage to the materials while on the builder's premises, had considerable weight with the Court when deciding that the materials did not become the property of the board. (e)

A contract provided that the plant brought on the works should "be deemed the property of" the employers "for the time being," and should "not be removed during the progress of the work without the written order of the engineer," and that, in case of suspension of the works by the engineer for any act or default of the contractor, the plant should be "subject to be used" in and

Clause as to
use of plant
on default,
and right to
set off as
"mutual
dealings."

(d) L. R. 2 C. P. 272, *ubi supra*.

(e) See *per* Bigham, J., *ib.*, at (1902) 1 K. B., p. 561.

about the completion of the works. The works were suspended, the contractor went into liquidation, and, the works having been completed by the employers, the plant was by consent sold. But it was held that the plant did not become the property of the employers, and that the user of the materials by them, after the suspension of the works, was not such a "dealing," within the meaning of the 39th section of the Bankruptcy Act, 1869, (*f*) as to entitle them to set off the value of the plant against the sum due to them from the contractor for breach of the contract. (*g*)

Rejected
materials.

Unless special provision is made, materials brought on the site, and rejected by the architect or engineer as unsuitable, would be subject to the ordinary vesting clause. It may be convenient, therefore, to provide that rejected materials shall cease to be the property of the employer.

SECT. V.—REGISTRATION OF BUILDING CONTRACTS AS BILLS OF SALE.

A building contract containing a clause to the effect that all building materials brought upon the ground should immediately become the property of the landowner is not a bill of sale, within the Bills of Sale Acts, 1878 and 1882, as being an agreement by which a right in equity to personal chattels is conferred. (*h*) Nor does a clause enabling the landowner, upon the default of the builder, to re-enter on the land and expel the builder, and that on such re-entry all the materials then in and about the premises shall be forfeited to and become the property of the landowner, make the building contract a bill of sale, as being a licence to take possession of personal chattels as security for a debt, for there is no debt; and if there was, the chattels are taken not as security for, but in discharge of, the debt. (*i*) The result would appear to be the same where the agreement provides that materials brought on the land shall be considered as immediately attached to and belonging to the premises. (*k*) Indeed, it would seem, from the judgment in *Reeves v. Barlow*, (*l*) that under no

(*f*) See now s. 38 of the Bankruptcy Act, 1883. 46 & 47 Vict. c. 52.

(*g*) *In re Winter, Ex parte Bolland*, 8 Ch. D. 225. See *Ex parte Price, Re Lankester*, L. R. 10 Ch. 648.

(*h*) *Reeves v. Barlow*, 12 Q. B. D. 436; *Blake v. Izard*, 16 W. R. 108.

(*i*) *Ex parte Newitt, In re Garrud*, 16 Ch. D. 522, *supra*; see, too, *Ex parte Parsons, Re Townsend*, 16 Q. B. D. 532.

(*k*) See *Brown v. Bateman*, L. R. 2 C. P. 272, *ante*, p. 172.

(*l*) *Supra*.

circumstances can an ordinary building agreement be a bill of sale, such documents not being within the scope of the Acts.

As stated in an earlier chapter, a mortgage of a building agreement stands on a different footing, and, whether or not an express power of selling the materials be contained in the mortgage, it is a bill of sale. (*m*)

SECT. VI.—TIME OF SEIZURE OF MATERIALS.

It should be remembered, in the event of the bankruptcy of either the builder or employer, that, where a building contract provides that, in case of delay or default on the part of the builder, the contract shall be considered void, and all materials and implements forfeited, it has been held that such a clause can only be enforced before the time originally fixed for the completion of the works expires. (*n*)

When right to seize materials must be exercised.

SECT. VII.—WORK DONE ON BUILDER'S PREMISES.

With respect to work to be executed on the premises of the builder, and which remains in his workshops at the time he becomes bankrupt, the presumption is that the ownership of the bankrupt continues whilst the articles remain in his possession, order, or disposition. (*o*) But if the articles have been so appropriated, and set apart for the employer, as to preclude the notion that they belong to the bankrupt, or that the employer assents to the bankrupt's disposition of them as owner, the title of the employer will prevail. (*p*)

Right to work in course of construction on bankrupt's premises.

The question whether there has been appropriation, where the contract is for the erection of a complete article, is one of some difficulty. Where a firm of shipbuilders contracted to build a ship for a firm of shipowners, to be constructed under the superintendence of the shipowners, the contract provided that the vessel as she was constructed and all her engines, etc., and all materials from time to time intended for her, whether in the

What constitutes appropriation.

(*m*) *Timpson v. Coles*, 23 Q. B. D. 465; *Church v. Sage*, 41 W. R. 175; and see generally as to mortgages, *ante*, p. 133.

(*n*) *Walker v. London and North-Western Ry.*, 1 C. P. D. 518; *Marsden v. Simbell*, 23 W. R. 952.

(*o*) Bankruptcy Act, 1883, s. 41, par. iii.

(*p*) *Wilkins v. Bromhead*, 5 M. & G. 963; *Ex parte Marrable*, 1 Gly. & J. 402; and see *Tripp v. Armitage*, 4 M. & W. 687. As to giving notice where materials are in custody of third party, see *Knowles v. Horsfall*, 5 B. & A. 131; *Tucker v. Ruston*, 2 C. & P. 86.

yard, or elsewhere, should, as the same proceeded, become the property of the purchasers, and should not be within the ownership control or disposition of the builders. Before completion, the shipbuilders became bankrupt, and the shipowners laid claim, under the contract, to a quantity of steel which was lying at the railway stations to the order of the shipbuilders. It was held that the contract was for the purchase of "a complete ship," and that the materials in question could not be regarded as appropriated to the contract or sold under the Sale of Goods Act, 1893. (q)

Time of
vesting.

It is, also, a general rule that the property in goods ordered to be made on the bankrupt's premises does not vest in the employer until they are completed, and paid for, or delivered. But where work was being done upon the bankrupt's premises, under a contract by which it was to be paid for by instalments, regulated according to the progress of the work, it was held that the materials as put together, or, at all events, after payment of the first instalment, belonged to the employer, and not to the trustee of the bankrupt. (r) Any materials, however, intended for the work, but not actually used for that purpose, would in such a case pass to the trustee. (s)

SECT. VIII.—EFFECT OF CERTIFICATE ON PROPERTY IN BUILDING MATERIALS.

Where a building contract is entered into, providing that, at certain times during the progress and until the completion of the work, the employer's architect shall, according to a schedule of prices to be agreed on between him and the contractor, certify the amount due and payable to the contractor, at the rate of 90 per cent., in respect of the value of the works executed and materials delivered, and thereafter the certificates shall be paid in full seven days after presentation; and all payments actually due to the

(q) *Reid v. Macbeth* (1904), A. C. 223, following *Seath v. Moore*, 11 A. C. 350.

(r) *Clarke v. Spence*, 4 Ad. & E. 448; *Holderness v. Rankin*, 2 De G. F. & J. 258. See *McBain v. Wallace*, L. R. 6 App. Cas. 588; *Ex parte Watts*, 9 Jur. N. S. 258; *Woods v. Russell*, 1 Dow. and R. 588; *Wood v. Bell*, 6 E. & B. 355; *Swainston v. Clay*, 4 Giff. 187. See *Clarkson v. Stevens*, 16 Otto, 505, U. S., and the Sale of Goods Act, 1893.

(s) See *Ex parte Barter, Re Walker*, 26 C. D. 510, *supra*, p. 173; *Baker v. Grey*, 17 C. B. 462; *Hawthorn v. Newcastle Ry. Co.*, 3 Q. B. 734. See *Goss v. Quinton*, 4 Scott, N. R. 471; *Woods v. Russell*, 1 D. & R. 587.

contractor in accordance with the contract, and not paid within seven days, are to bear interest until payment; on the giving of a certificate by the architect, the property in the materials comprised in it will pass at once to the employer, though the materials are not yet fixed in the work, but remain loose on the employer's land. (t)

(t) *Banbury, etc., Ry. Co. v. Daniel*, 54 L. J. Ch. 265.

CHAPTER XIV.

EXTRAS.

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SECT. I.—GENERALLY.

THE subject of this chapter may, in the first place, be conveniently considered under two heads: (1) cases where, by the terms of the contract, some particular authorisation is required before any claim can be made for extra work; and it should be borne in mind that the rules with respect to agreements making the architect's certificate a condition precedent to payment, etc., which have already been stated, will be equally applicable to this class; and (2) cases where there is no such provision, but extra work has been done beyond the original contract.

What are
extras.

The question as to what are extras must, of course, depend upon the particular circumstances of each case; but if the contract provides that extras are to be paid for at the price fixed by the architect, this impliedly gives him power to determine what are extras under the contract. (*a*)

SECT. II.—WHERE CONTRACT CONTAINS PROVISIONS AS TO EXTRAS.

(1) PROVISION MAKING SPECIAL ORDER FOR EXTRAS NECESSARY.

If a building contract provides that no extra work or alterations shall be charged for unless they have been previously authorised

(*a*) *Richards v. May*, 10 Q. B. D. 400.

in a particular manner, that provision, if not legally waived, (*b*) must be strictly followed; if not, no claim can be maintained for such extra work or alterations. (*c*) For instance, if it is stipulated that no extra work shall be paid for unless the contractor previously obtain an order in writing, no claim can be made unless this stipulation is complied with. (*d*) Nor will the mere want of writing give ground for relief in equity. (*e*)

Where a clause stipulates that for all extra work written directions shall be given by the architect; a sketch made by the architect, and not signed by him, is not such a direction as complies with the contract, (*f*) nor are the mere oral directions of the employer to do some increased work, in the absence of proof of a new contract. (*g*)

But it should be borne in mind that the extra work ordered may not be an addition within the meaning of the original contract, but may be entirely *dehors* the same, amounting to a new contract; in which case a written order would not be necessary to entitle the builder to maintain an action for the work. (*h*)

(2) EFFECT OF CERTIFICATES UPON EXTRAS.

It frequently occurs that the architect gives a certificate including extra work, and, as has been seen, there is a distinction between a final certificate and a "progress" certificate, (*i*) as the former may do away with the necessity for a written order, but the latter cannot have this effect.

A progress certificate is not a "written order" within the meaning of a clause providing that no alterations or additions should be made without a written order from the employer's

b As to waiver, see the American case of *Norwood v. Lathrop* (1900), 178 Mass. 208.

c *Thames Iron Works Co. v. The Royal Mail Steam Packet Co.*, 8 Jur. N. S. 100.

d *Russell v. St. Da Bendeira*, 13 C. B. N. S. 110. For a form of decree for inquiries and accounts in action by building contractor against his employer and architect, see *Kimberley v. Dick*, L. R. 13 Eq. 22; and *Kemp v. Rose*, 1 Gil. 269. A form of clause providing for a written order will be found at p. 376, *post*.

e *Kirk v. Broadway Union*, 2 Phill. 649; S.C., 17 L. J. N. S. Ch. 127; *Richards v. May*, 10 Q. B. D. 490.

f *Myers v. Searl*, 30 L. J. Q. B. 9.

g *Franklin v. Dirke*, 3 F. & F. 65; and see note to case *ib.*, p. 66.

h See *ante*, p. 139, *et seq.*, as to the right of the builder to sue on a new contract.

i See *ante*, p. 95, as to "progress" certificates.

engineer. (*k*) A similar decision was also arrived at in another case, (*l*) where the certificates during the progress of the works were made generally in respect of the works actually done, without distinguishing one kind from the other; although letters were in evidence signed, some by one of the architects, and others by both, in which allusion was incidentally made to some of the additional works in progress, and containing suggestions as to the mode of executing them, and the architects, on the application of the plaintiff (but long after the works were complete), made a final valuation of the additional works, and signed a paper stating the amount of their valuation.

Effect of
final
certificate.

But, however, in *Goodyear v. Weymouth (Mayor, etc.)*, (*m*) where the building contract provided that no extra work should be done without the written authority of the architect, and that no claim should be made for extras without the production of the written order of the architect, signed when the instructions for them were given; and that the architect's decision, as regarded the value of the extras and additions, should be final, and the architect certified that a certain sum, which included extras and additions, was proper to be paid; it was held that neither party could raise the question of whether or not there was sufficient order in writing, and that the architect's certificate was conclusive. But where a building contract provides that no extras shall be paid for unless ordered in writing, and weekly bills delivered for the same, and this has not been done, though extra work is executed, the fact that the architect's certificate for the final balance awards a certain sum in respect of extras, does not entitle the builder to recover beyond the certified sum for extras in respect of which written orders have not been given, nor weekly bills delivered. (*n*)

Clause affect-
ing finality
of final
certificate.

The contract may, however, contain terms which prevent the architect's certificate being final as to extras. In *Lorden & Son v. Pryce*, (*o*) a building contract contained the usual clause referring questions which might arise to the architect, and another clause requiring that orders for extras were to be signed by the

(*k*) *Tharsis Sulphur Co. v. M'Elroy*, 3 App. Cas. 1040. See *ante*, p. 104, as to certificates covering "extras."

(*l*) *Lamprell v. Billericay Union*, 3 Ex. 283.

(*m*) H. & R. 67. *Quære* in this case whether an order by the corporation under their seal would be necessary to entitle the plaintiff to recover in respect of the works independent of the contract, if they were not within the certificate of the architect. See *Lapthorne v. St. Aubyn*, 1 C. & E. 486.

(*n*) *Brunsdon v. Staines L. Bd.*, 1 Cab. & El. 272.

(*o*) Appendix, p. 664.

secretary and treasurer of the defendants, and countersigned by the architect. The builder having completed the work, the architect issued a final certificate, which apparently included certain extras which had not been signed for by the secretary and treasurer. It was held that, the architect having no power to get rid of the clause requiring the signature of the secretary and treasurer, the cost of the extras could not be recovered.

It will be observed that the certificate under the above circumstances binds the employer to the same extent as the contractor. (p) Equally binding on employer.

It may here be mentioned that where a contract contains a provision that if any dispute, difference, or question shall arise with the contractors in any way relating to the contract, such dispute, difference, or question shall be settled by the architect, whose decision shall be absolute and final, it seems that this condition will not apply to differences between the contractors and their employers as to their claim for extras after the completion of the work. (q) Whether provision as to decision of architect in case of disputes applies to extras.

(3) WHERE VALUE OF EXTRA WORK MUST BE ASCERTAINED.

By the terms of some contracts certain preliminary matters may also be necessary before the builder is entitled to bring an action for extra or additional work. Where a contract provides that the engineer may order additions or alterations in writing, and that the value of such additions or alterations should be "ascertained," and added to or deducted from the contract price, as the case might be; and, further, that any dispute or difference as to such additions or alterations should be referred to the engineer, whose decision or valuation should be final; no action can be maintained for extras, the value of which has not been ascertained. (r) Action may not be maintainable before value of extra work is ascertained.

(p) See cases, *supra*; and see *Rogers v. James*, 56 J. P. 277.

(q) See *Pashby v. Birmingham (Mayor)*, 18 C. B. 2. The headnote to this case is wrong, as the point there referred to was not actually decided. See *Lawson v. Wallasey L. Bd.*, 11 Q. B. D. 229. And see cases, *ante*, p. 94, *et seq.*, as to certificates.

(r) *Westwood v. Secretary of State for India*, 11 W. R. 261. *Semble* that the valuation should have been by the engineer. See *Richards v. May*, 10 Q. B. D. 400. For a form of clause providing allowances for alterations, see *post*, p. 294.

(4) EXTRA WORK AFTER DAY FIXED FOR COMPLETION.

In a Scots case, (s) in which *Dodd v. Churton*, (t) *Jones v. St. John's College, Oxford*, (u) and other English cases were cited, a question arose as to the right of a builder to recover for extra work done by him after the day when the entire work should have been completed. A builder brought an action against the proprietor of a mansion-house for the balance of the amount averred to be due to him under a contract for mason-work in connection with alterations and additions to the mansion-house. The proprietor refused to pay the sum sued for, except under deduction of, *inter alia*, a sum limited to £150, which he alleged was due to him under the contract as penalty for delay in the execution of the work. By the terms of the contract, the pursuer undertook to have the whole work "entirely completed" by May 1, 1897, under "a penalty of 10s. per day that the mason-work remained unfinished beyond that date." Further, by the contract the defender had reserved to him power "to make any alterations on and to increase, lessen, or omit any portion of the works," while it was provided that extra work, if any, should form no ground for deviating from the dates above fixed for the completion of the work unless specially certified by the architect at the time. It was proved (1) that the pursuer failed to have the work stipulated for completed at any of the respective dates; (2) that he obtained no certificates from the architect sanctioning deviation from any of the dates, no such certificate having been applied for; (4) that the architect made frequent complaints of delay; (5) that extra work was ordered by the defender during the progress of the operations, and that some of this extra work was ordered after May 1, 1897. It was not clearly shown, however, what extent of the work was completed by May 1, 1897, what extras were ordered after that date, how far extras ordered before that date hindered the completion of the work at that date, or how much time was occupied after that date by the execution of extras. It was held (Lord Young doubting) that the fact that some of the extra work had been ordered after May 1, 1897, did not of itself prevent the enforcement of the penalty clause; that the onus was upon the pursuer to show that the extra work ordered by the defender had been the cause of the delay in

(s) *Steel v. Bell* (1900), 38 S. L. R. 217.(t) (1897) 1 Q. B. 562, noted *ante*, p. 141.(u) L. R. 6 Q. B. 115, see *ante*, p. 140.

completing the work; that the pursuer had failed to discharge this onus, and that the defender was therefore entitled to deduct from the amount claimed by the pursuer £150 as penalty for delay in terms of the contract.

SECT. III.—WHERE CONTRACT HAS NO PROVISION AS TO EXTRAS.

(1) RIGHT TO SUE FOR EXTRAS SEPARATELY.

There is a class of cases which appears at first sight to be an exception to the general rule, that so long as a special contract remains open, no action lies by the builder or contractor. Where something has been done by the builder *beyond* what he was to perform according to the special contract, and that has been done at the instance of the employer, the price of the extra work, not being under the contract at all, can be recovered for work and labour done; yet the contract must be proved, in order that it may appear how much was extra, in the absence of positive proof that the work in question was entirely separate from that included in the agreement, and was in fact done under a distinct order. (r) Where, however, the extra work is totally unconnected with the agreement, it is submitted that that document need not be produced. (w)

Right to sue for extras separately.

(2) AUTHORITY OF ARCHITECT AS TO EXTRAS.

When extra work is ordered by the architect, either in the progress of building under a contract where there is no provision which necessitates a previous authorisation in writing or otherwise, or which is shown to be *dehors* the original contract, the ordinary principles of law relating to principal and agent (x) will apply. The extent of the architect's authority has already been pointed out. (y) But the architect is only the agent of his employer to see that the works contemplated by the contract are carried out

(v) *Burton v. Cornish*, 1 D. & L. 585; *Jones v. Howell*, 4 Dowl. P. C. 176; *Vincent v. Cole*, 3 C. & P. 481, *per* Lord Tenterden; *Holbard v. Stevens*, 5 Jur. 71; *Parton v. Cole*, 6 Jur. 570. See *Reid v. Batte*, M. & M. 413; *Russell v. Sa Da Bendeira*, 13 C. B. N. S. 149; *Edie v. Kingford*, 11 C. B. 759; *Inglis v. Buttery*, 3 A. C. 552.

(w) *Reid v. Batte*, M. & M. 413.

(x) See *Leake on Contracts* (4th ed. 1902), p. 308, *et seq.*; *Smith's Merc. Law* (11th ed. 1905), p. 135, *et seq.* A form of clause in a building agreement allowing the architect to order extras will be found, *post*, p. 384.

(y) See *ante*, pp. 87, *et seq.*

properly; he cannot, without authority, bind his employer to pay for additional work. Where, therefore, extra work is done by order of the architect, the builder must show an authority in the architect to give directions for extra work; and, when the architect is shown to be the employer's agent to bind him by any deviation or addition, it will be necessary to inquire whether the agency of the architect to order extras was general, or limited to a specified extent. (z)

Architect's
liability for
extras.

Warranty of
authority.

The architect may render himself personally liable for the value of extra work executed by the builder, if he expressly or impliedly, without having such power, represent to the builder that he has the authority of the employer to order such work. (a)

(3) EXTRA WORK ORDERED BY EMPLOYER.

If it is alleged that the order was given by the employer, the contractor, suing for work extra the original contract, must not only put in that contract, if in writing, but also prove a separate and distinct contract with the employer to do the work sued for. (b) If the builder has done extra work without any authority from the employer, the latter will not be bound to pay for it. (c)

Effect of
assent to
alterations.

The mere fact of the employer having assented to certain alterations is not sufficient to make him liable to pay for them as extras, unless he is either expressly informed, or must necessarily from the nature of the work be aware, that the alterations will increase the expense. (d) But where it was shown that, in the progress of building, some process more expensive than that contracted for was ordered by the architect, with the knowledge of the employer, who was present at the time, and the builder's sub-contractor was told that it was to be charged as additional work, it was considered that there was sufficient evidence of a contract to pay the builder extra for it, and of authority in the architect to make such a contract with him. (e)

(z) *Rex v. Peto*, 1 Y. & J. 37; *Cooper v. Langdon*, 9 M. & W. 60; *Coker v. Young*, 2 F. & F. 98. And see *Wallis v. Robinson*, 3 F. & F. 307; *Lovelock v. King*, 1 M. & R. 60.

(a) *Randell v. Trimen*, 18 C. B. 786. See *ante*, p. 91; *Firbank v. Humphreys*, 18 Q. B. D. 54; *Elkington v. Härter*, [1892] 2 Ch. 452; *Oliver v. Bank of England* (1902), 1 Ch. 610.

(b) *Eccles v. Southern*, 3 F. & F. 142.

(c) *Dobson v. Hudson*, 1 C. B. N. S. 659.

(d) *Lovelock v. King*, 1 M. & R. 60.

(e) *Wallis v. Robinson*, 3 F. & F. 307.

(4) EVIDENCE ON CLAIM FOR EXTRAS.

Upon the principle that contracts in writing cannot be varied by extrinsic evidence of the intention of the parties, where a claim is made for extra work beyond that contracted for in a written contract, the question whether the work is extra can only be decided by reference to the written contract, which must therefore be produced in support of the claim. (f) If the written contract is inadmissible for want of a stamp, the judge cannot look at it for the purpose of determining whether the extra work is included in it or not. (g) It is now enacted that all such instruments as may be stamped after execution can be received in evidence at the trial, or before an arbitrator or referee, by payment to the officer of the Court, or to the arbitrator or referee, of the proper duty and penalty and the further sum of £1. (h)

Written contract to be produced.

Want of stamp.

Where the written agreement between the parties is *collateral* to the question in issue, it need not be produced; as, for instance, if it clearly appears that, whilst certain work was in progress in the inside of a house under a written agreement, a verbal order was given to execute some alterations or improvements on the outside. (i)

Collateral agreement need not be produced.

(5) WHAT CANNOT BE INCLUDED IN A CLAIM FOR EXTRAS.

Where details indispensable for the completion of the work, and which it must have been the intention of the parties to include in the agreement, are omitted from the specification, the builder cannot make a claim for such articles as extras, *e.g.* a contractor was not entitled to recover for the flooring as an extra. (k)

When details cannot be charged as extras.

A builder who has accepted a contract upon an erroneous Error in quantities.

(f) *Burton v. Cornish*, 1 D. & L. 585; S.C., *Jones v. Howell*, 4 Dowl. P. C. 176; *Holbard v. Stevens*, 5 Jur. 71, Bail C., per Williams, J.; *Parton v. Cole*, 6 Jur. Bail C. 370, per Patteson, J. See *Edie v. Kingsford*, 23 L. J. C. P. 123.

(g) *Vincent v. Cole*, M. & M. 257, per Lord Tenterden. See *Edie v. Kingsford*, 23 L. J. C. P. 123, where it was held that the defendant was not entitled to a non-suit, but the Court made a rule for a new trial. *Hughes v. Budd*, 8 Dowl. P. C. 478; *Fielder v. Ray*, 3 M. & P. 659; *Stephens v. Pinney*, 2 J. B. Moore, 349.

(h) Stamp Act, 1801, 54 & 55 Vict. c. 39, s. 14.

(i) *Reid v. Batte*, M. & M. 413, per Lord Tenterden, commented on by Patteson, J., in *Parton v. Cole*, 6 Jur. Bail C. 370. See *Vincent v. Cole*, *supra*; *Erskine v. Aldeane*, L. R. 8 Ch. 766; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Morgan v. Griffith*, L. R. 6 Ex. 70.

(k) *Williams v. Fitzmaurice*, 3 H. & N. 844. See *Thorn v. Mayor of London*, L. R. 9 Ex. 163; and *Sharpe v. San Paulo Ry.*, L. R. 8 Ch. Ap. 597, *ante*, p. 17, under "Specifications."

statement of the quantities, taken out by the architect, cannot claim for extra quantities of materials used. (*l*)

Builder cannot recover for better materials than contracted for.

If the builder, in completing a contract for a stipulated price, use materials of a better kind than those contracted for, he is not at liberty, on that account alone, to charge more than the stipulated price, nor, of course, can he require the materials worked into the building to be returned, because the employer will not pay an increased price on account of the better materials. (*m*)

(6) HOW FAR ORIGINAL CONTRACT EXCLUDED BY EXTRAS.

Where original contract deviated from,

or abandoned.

When work is to be done, and materials supplied, under a building contract for certain estimated prices, and there is subsequently a deviation from the original contract by the consent of the parties, the contract and estimate are not on that account excluded, but are to be the rule of payment, so far as the special contract can be traced to have been followed; and for any excess the party is entitled to sue as upon a *quantum meruit*, although the time for completing the payments under the original contract has not expired when the action is commenced. (*n*) But if the work to be carried out under the original contract has been so entirely abandoned, and there is such a total deviation, that the terms are not applicable to the new work, and it is impossible to trace the contract, and to say to what part of it the new work should be applied, the builder is entitled to recover by measure and value for all the work, as if there had been no contract at all. (*o*)

Usual condition that extras shall not vitiate contract.

Building contracts, in general, specially provide that any alterations or additions in or to the works shall not vitiate the contract; but that all additions, omissions, or variations, made in carrying out the works, for which a price may not have been previously agreed upon, are to be measured and valued, and certified for by the architect, and added to, or deducted from, the amount of the contract, as the case may be, according to a schedule of prices annexed, or, where the same may not apply, at fair measure and value. (*p*)

(*l*) *Servener v. Pask*, 18 C. B. N. S. 785; *Coker v. Young*, 2 F. & F. 98; *Kemp v. Rose*, 1 Giff. 258; *Kimberley v. Dick*, L. R. 13 Eq. 22. See *ante*, the cases referred to at p. 13, under "Quantities."

(*m*) *Wilmot v. Smith*, 3 C. & P. 453.

(*n*) *Robson v. Godfrey*, Holt, 236; *Pepper v. Burland*, Peake, 139; *Ellis v. Hamlen*, 3 Taunt. 52. See *Hoadley v. MacLaine*, 4 M. & S. 340; *Jackson v. Galloway*, 6 Scott, 786; *Lovelock v. King*, 1 M. & R. 60. See the cases considered *ante*, p. 126, *et seq.*

(*o*) See cases in note (*n*), *supra*.

(*p*) See the Precedents, *post*.

It may be stipulated, at the time when the agreement for alterations or deviations is made, that the terms of the original contract shall be applicable to the same. And where, in a contract under seal, there was a stipulation that the employers might make additions to the original works on giving the contractor written instructions for that purpose signed by the engineer; and a verbal arrangement was afterwards made by the engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating, with the exception of that variance, that all the provisions of the contract should be considered as applicable to the extension work; it was held that the contractor could not afterwards reject the terms of the contract, and claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken independently of the contract. (q)

As to extras in contracts with corporations, see *ante*, p. 115. (r)

As to effect of extras on time conditions, see *ante*, p. 139.

(q) *Ranger v. Great Western Ry.*, 5 H. L. Ca. 72.

(r) But see *Goodyear v. Weymouth (Mayor)*, H. & R. 67, *ante*, p. 184, n.

CHAPTER XV.

BUILDING BECOMING IMPOSSIBLE.

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SECT. I.—BUILDING BECOMING IMPOSSIBLE—GENERALLY.

Where performance of a building contract becomes impossible.

WHERE, subsequently to the making of the contract, the performance of the work becomes impossible, it will depend upon the construction of the agreement whether the contract remains applicable to the subsequent impossibility, or on whom the consequences of such impossibility shall fall.

Where the law creates a duty or charge, and the party is disabled from performing it without any default in him, there the law will excuse him, as expressed by the maxim, "*Lex non cogit ad impossibilia*;" but where the party by his own contract creates a duty or charge upon himself, then he is bound to make it good, notwithstanding any inevitable accident, because he might have provided against it by his contract. (a) If a person by his own contract absolutely engage to do anything without any qualification, he must make compensation in damages, although the performance is rendered impracticable by some unforeseen cause over which he had no control. (b)

(a) *Per Cur. in Paradine v Jane*, Aleyn. 26. But see *Nickoll v. Ashton* (1901), 2 K. B. 126, *post*, p. 194; *Atkinson v. Ritchie*, 10 East, 530, and cases thereunder. *Per Willes, J., in Clifford v. Watts*, L. R. 5 C. P. 586. See p. 125 as to right to payment in case of accident after part performance of the work. By the French law the contractor is liable if he supplies the materials when the subject-matter of the contract is lost in any manner before delivery. "Si dans le cas où l'ouvrier fournit la matière, la chose vient à périr, de quelque manière que ce soit, avant d'être livrée, la perte en est pour l'ouvrier, à moins que le maître ne fût en demeure de recevoir la chose." Code Civil, Liv. III. tit. viii. 1788. See as to Roman law, LL. 20, 63, ff. de contrah. empt. Pothier, *Louage*, 425.

(b) *Per Cur. in Ford v. Cotesworth*, L. R. 4 Q. B. 134; *Baily v. De Crespigny*, L. R. 4 Q. B. 180. See *Jones v. St. John's College, Oxford*, L. R. 6 Q. B. 115,

It is consequently important that the agreement to build should contain an exception against accident, etc., as otherwise the builder will be bound by his stipulation, notwithstanding any obstacle arising by accident, etc.; for, although the law excuses accident against an implied covenant for performance, yet it will not against an express one. (c)

Upon the above principles a covenant to build a bridge, and to keep it in repair for a certain time, was held to bind the covenantor to rebuild the bridge, although it was broken down by an extraordinary flood. (d) Again, in a Canadian case, where a partially completed building was destroyed by fire, and the builder sued as on a *quantum meruit*, it was held that he could not recover. (e) And where a builder contracted to do certain specific works, including alterations, within a fixed time; (f) or according to a specification; (g) it was held, in the first case, to be no excuse that alterations rendered performance of the work within the time fixed impossible; or, in the second case, that the work was impracticable according to the specification. If one party to a contract stipulates for the option of performing his part in one of two lawful ways, he is, after having once made his election, bound by such election; and if the performance is impossible, and not illegal, he is liable to damages for not being able to perform it. So an insurance company, having elected to reinstate insured premises which had been damaged by fire, were held bound to reinstate, though the buildings were taken down by the public authority as dangerous. (h)

Examples
of building
contracts
becoming
impossible.

Reinstato-
ment of
buildings.

There is a curious rule laid down in 1 Roll. Abr. as follows: (i) "If a man covenant to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant for not doing thereof before the day, for the law will not compel him to venture his life for it, but he may do it after." But it

(c) See *Barker v. Hodgson*, 3 M. & S. 267; *Thornborow v. Whitacre*, 2 Ld. Raym. 1164. A suitable clause will be found at p. 381, *post*.

(d) *Brecknock Navigation, etc. v. Pritchard*, 6 T. R. 750; see *Dyer*, 33 a (10). Cf. the American case of *Livingstone v. Graves*, 32 Miss. 479, where one agreed to keep a bridge in repair for three years, and it was burnt up, and he was held not bound to rebuild it. See *Errington v. Aynesley*, 2 Bro. C. C. 340; *Eastbourne L. Bd. v. Jackson*, *Times*, February 19, 1885.

(e) *King v. Low* (1901), 11 Ont. L. R. 234.

(f) *Jones v. St. John's College, Oxford*, L. R. 6 Q. B. 115; and see *ante*, p. 140.

(g) *Thorn v. Mayor of London*, 1 App. Cas. 120; and see *ante*, p. 17.

(h) *Brown v. Royal Insurance Co.*, 22 L. J. Q. B. 270, *Erle, J., dissentiens*; *Barkworth v. Young*, 4 Drew. 1.

(i) P. 450, pl. 10.

would seem that the contract would be suspended only, (*k*) not dissolved.

Where
contract
conditional
upon the
existence of
the subject.

Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach the contract becomes impossible from the perishing of the thing without the default of the contractor. (*l*) Where a contract was made for the erection of machinery upon buildings of one of the parties, to be paid for on completion; and in the course of the work the premises were destroyed by fire; it was held that both parties were excused from further performance, and no liability accrued on either side. (*m*) So with a contract for the construction and fitting of engines for a ship then on voyage, to be paid for by instalments; under which the work was commenced and payments made accordingly, but before completion the ship was lost at sea; it was held that both parties were discharged from further performance, that the shipowners had acquired no property in the materials, and that they could not recover instalments already paid as on failure of consideration. (*n*)

Contract to
erect
machinery. }

Where there was a contract to ship goods at a certain time by a particular ship, and the ship became stranded, and so much damaged as to render it impossible for her to arrive at the port of loading in time, it was held (*o*) that the contract must be construed as subject to an implied condition that, if at the time for its performance, the vessel should, without fault on the defendant's part, cease to exist as a ship for the purpose of shipping the cargo, the contract should be treated as at an end. (*p*)

Rights of
parties when
building

Where a building under repair is accidentally destroyed by fire, the rights of the builder who is doing the repairs and building

(*k*) See *per* Campbell, C.J., in *Hall v. Wright*, 27 L. J. Q. B. 354, 355.

(*l*) *Per Cur.* in *Taylor v. Caldwell*, 3 B. & S. 833. See also *Howell v. Coupland* (1876), 1 Q. B. D. 258.

(*m*) *Appleby v. Myers*, L. R. 2 C. P. 651; *ante*, p. 125.

(*n*) *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271, 571.

(*o*) Following *Taylor v. Caldwell* and *Howell v. Coupland*, *supra*, Vaughan Williams, L.J., dissenting.

(*p*) *Nickoll v. Ashton* (1901), 2 K. B. 126.

owner have to be considered. It is submitted that if instalments have been paid to the builder he can retain them; and further, he may recover any sums which have accrued due prior to the date when the building was destroyed. This principle appears to have been laid down in what are known as the "coronation seat cases," which arose in consequence of the postponement of the coronation on June 26, 1902. In one of these cases the defendant agreed to let to the plaintiff a room for the purpose of viewing the procession for a sum of money payable before the date of the procession, and the plaintiff paid £100 part of that sum before the date when the procession was to have taken place. In an action brought to recover the £100 which had been paid, it was held that the plaintiff was not entitled, but that the defendant (on his counterclaim) was entitled to the unpaid balance, inasmuch as his right to that payment had accrued before the procession became impossible. (g)

destroyed
by fire.

Coronation
seat cases.

"Where there is an agreement which is based on the assumption by both parties that a certain event will in future take place, and that event is the foundation of the contract, and through no default by either party, and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that, before the time fixed for that event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made, and any legal right previously accrued according to the terms of the agreement, will not be disturbed." (r)

Where premises insured against fire are burnt down, the company in the event of a total loss may reinstate the property equivalent to that destroyed; and in the event of partial loss may repair and put the property in the same state as it was in before the fire. (s)

Rights of
insurance
companies.

(g) *Chandler v. Webster* (1904), 1 K. B. 493.

(r) *Ib.*, per *Romer, L.J.*, at p. 501 in the L. R.

(s) 14 Geo. 3, c. 78, s. 83, the operation of which is not confined to the Metropolis, *Ex parte Gorely*, 1 D. L. & S. 477; *Anderson v. Commercial Insurance Co.*, 55 L. J. Q. B. 146; 34 W. R. 189. See also *Clark v. Lindsay*, 88 L. T. 198; *Blakeley v. Muller*, 67 J. P. 51, followed in *Elliott v. Crutchley* (1906), A. C. 7; *Civil Service Co-op. Soc. v. General Steam Navigation Co.* (1903), 2 K. B. 756. For a form of clause providing that the builder shall insure against fire, see *post*, p. 387; and for a clause providing for waiver of penalties in case of fire, see p. 391.

SECT. II.—IMPOSSIBILITY BY ACT OF GOD.

It is a rule of law that when the law creates a duty, and the party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident, by inevitable necessity. (*t*) "The act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression; what is meant is that it was not within the contract." (*u*)

SECT. III.—IMPOSSIBILITY BY ACT OF LAW.

Impossibility of building caused by act of law. No contract can be carried into effect which was originally made contrary to the provisions of law (*e.g.* a contract for building in contravention of the provisions of the London Building Act, 1894), (*v*) or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law. (*x*) Upon this principle, a covenant, restrictive of the use of land as regards building, is discharged by a railway company subsequently taking the land under compulsory powers and building a station upon it. (*y*)

SECT. IV.—IMPOSSIBILITY BY ACT OF PARTIES.

Impossibility caused by party to contract. See *ante*, Chap. IX., p 112., *et seq.*

(*t*) *Per Cur.* in *Nichols v. Marsland*, 2 Ex. D. 4. See *Nugent v. Smith*, 1 C. P. D. 429, for the explanation of the analogous terms of the civil law *damnum fatale, casus fortuitus, vis major*.

(*u*) *Per Cur.* in *Baily v. De Crespigny*, L. R. 4 Q. B. 180. See Co. Lit. 206 (*a*); *Laughter's Case*, 5 Co. 21 (*b*); *Wear Commissioners v. Adamson*, 1 Q. B. D. 546.

(*v*) *Stevens v. Gourley*, 7 C. B. N. S. 99. See the London Building Act, 1894, *post*, Part III.

(*x*) *Per Cur.* in *Atkinson v. Ritchie*, 10 East, 534.

(*y*) *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Doe d. Anglesea v. Rugeley*, 6 Q. B. 107. See *Newby v. Sharpe*, 8 Ch. D. 39; *Newington L. Bd. v. Cottingham L. Bd.*, 12 Ch. D. 725.

CHAPTER XVI.

SPECIFIC PERFORMANCE OF BUILDING CONTRACTS AND AGREEMENTS FOR BUILDING LEASES.

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SECT. I.—SPECIFIC PERFORMANCE OF BUILDING CONTRACTS.

(1) GENERAL RULE.

It is now settled that, with certain exceptions, the Court will not decree specific performance of contracts to build, on the general principle that the Court does not specifically enforce contracts involving personal services, skill, or confidence, (*a*) or contracts the performance of which it cannot adequately supervise.

Upon this principle the Court has refused to enforce a covenant to lay out a given sum on a building of a certain value; (*b*) and

a *Kay v. Johnes*, 2 H. & M. 118. See *Cooper v. Jarman*, L. R. 3 Eq. 98; *Saunders v. Bradbury Harbour Improvement Co.*, W. N. 1885, p. 36; *Ferrington v. Aynesley*, 2 Bro. C. C. 343, cited by Grant, M.R., in *Flint v. Brandon*, 8 Ves. 163. See also *Lucas v. Comerford*, 3 Bro. C. C. 166, as to Lord Thurlow's opinion against decreeing specific performance of a covenant to build; *Paxton v. Newton*, 2 Sm. & Giff. 437; *Craven v. Tickell*, 1 Ves. 60; *Mosely v. Virgin*, 3 Ves. 184; *Flint v. Brandon*, 8 Ves. 159; *Booth v. Pollard*, 4 Y. & C. Ex. 61; *Pollard v. Clayton*, 1 K. & J. 462; *Abinger v. Ashton*, L. R. 17 Eq. 353. See *Strelley v. Pearson*, 15 Ch. D. 113; *The South Wales Ry. Co. v. Wythes*, 1 K. & J. 186.

b *Ferrington v. Aynesley*, *supra*; *Mosely v. Virgin*, *supra*; *Brace v. Wainert*, 25 Beav. 348. See *Belancorth v. Dean of St. Paul's*, Sel. Cas. in Chancery, 1852 vol. xl., 1850.

would not enforce the usual stipulations for building in a building agreement. (c)

(2) EXCEPTIONS.

There are, however, exceptional cases which seem to show that the ground, often alleged, for the refusal of the Court to interfere in the case of building contracts—that it has no sufficient means of ascertaining whether the work has been properly executed, or the stipulated amount expended thereon—is not always a sufficient reason.

Where the work is sufficiently defined.

Thus, in *Mosely v. Virgin*, (d) Lord Loughborough, L.C. was of opinion that specific performance of an agreement to build might be decreed if sufficiently certain; and this opinion was concurred in by Romilly, M.R., in *Brace v. Wehnert*, (e) and it has also been held that where a contract to build or to repair is in its nature defined, the Court will enforce the same specifically. (f)

The doctrine of Lord Loughborough, (g) as will be seen from cases to which reference will be made in this chapter, has, to a certain extent, received confirmation.

Where work is defined, and is to be executed on defendant's land.

The Court has jurisdiction to enforce specific performance of a contract to do work, which is not only defined, but is to be done upon the defendant's own property, and in the performance of which the plaintiff has a material interest, which is not capable of adequate compensation in damages. The fact that the plaintiff, by reason of his having parted with his land to the defendant, has no opportunity of erecting the buildings at his own cost, and so ascertaining the amount of damages sustained by reason of the non-performance of the contract, makes a Court of Equity more anxious to decree specific performance of a contract to build. (h)

An exception to the general rule is recognised if the plaintiff

(c) *Wilkinson v. Clements*, L. R. 8 Ch. 96.

(d) *Mosely v. Virgin*, 3 Ves. 184. See *Cubitt v. Smith*, 10 Jur. N. S. 1123; *Baumann v. James*, L. R. 3 Ch. 508. Cf. *Greenhill v. Isle of Wight Ry. Co.*, 19 W. R. 345; *Bernard v. Meara*, 12 Ir. Ch. R. 389, 397. *Fry on Specific Performance* (4th ed.), 43.

(e) *Brace v. Wehnert*, 25 Beav. 348; *Soames v. Edge*, 1 Johns. 673.

(f) *Hepburn v. Leather*, 50 L. T. 660.

(g) *Mosely v. Virgin*, *supra*. See *Fry* (4th ed.), 43; and *Cubitt v. Smith*, 10 Jur. N. S. 1123.

(h) *South Wales Ry. Co. v. Wythes*, 1 K. & J. 200; and see *Price v. Corporation of Penzance*, 4 Hare, 506; *Soames v. Edge*, 1 Johns. 669; *Darnley v. L. C. & D. Ry. Co.*, 1 De G. J. & S. 204; 3 *ib.* 24; L. R. 2 H. L. 43; *Hood v. N. E. Ry. Co.*, L. R. 5 Ch. 525. See *Wilson v. Northampton & Banbury Ry. Co.*, L. R. 9 Ch. 279; and *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*,

can establish (1) that the building work, of which he seeks performance, is defined by the contract; (2) that he has a substantial interest in having the contract performed, which is of such a nature that he cannot be compensated for breach of the contract by damages; (3) that the defendant has by the contract obtained possession of the land on which the work is contracted to be done. (i)

It was held that a covenant "to erect and build seven messuages or dwelling-houses on the demised premises, with all suitable out-buildings thereto, in a workmanlike manner, and under the direction and to the satisfaction of the surveyor or agent for the time being of the lessor, and similar to the messuages or dwelling-houses already erected in Percy St.," was sufficiently specific, although the houses in Percy St. were not all the same, and there was sufficient variety to make it uncertain which was to be followed. (k)

What is sufficient definition.

It was also held in this case that damages assessed on the principle of *Ebbetts v. Conquest* (l) would afford no adequate remedy.

Upon the same principle as to work sufficiently defined, the Court has decreed that the elevation of a house should be altered to correspond with the adjoining houses, according to the covenant of the lease to that effect, (m) and that a building line be adhered to. (n)

Elevation of house altered, or special purpose carried out.

(3) WHERE THERE HAS BEEN PART PERFORMANCE.

Part performance of a contract has, in some cases, induced the Court to exercise a jurisdiction, which it would not have done if the contract had remained wholly executory. Thus, where purchasers of land covenanted to make a road and erect a market-house; and they entered into possession, but did not build the

L. R. 9 Ch. 331, distinguished in *Toll v. Millard G. W. Ry. Co.*, 9 L. R. Ir. 85; *Green v. West Cheshire Ry. Co.*, L. R. 13 Eq. 41; *Woodruff v. Brecon, etc., Ry. Co.*, W. N. S. 1884, pp. 208, 231; *Att.-Gen. v. Mid-Kent, etc., Ry. Co.*, L. R. 3 Ch. 100; *Fortescue v. Lostwithiel & Fenny Ry. Co.*, [1891] 3 Ch. 621; *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 28; *Egan v. Mutual Tenure, etc., Association* [1893], 1 Ch. 116, *per* Kay, J., at p. 128.

(i) *Wolverhampton Corporation v. Emmons* (1901), 1 K. B. 515.

(k) *Molyneux v. Richard* (1906), 1 Ch. 31.

(l) 1895, 2 Ch. 377.

(m) *Franklyn v. Tuton*, 5 Mowl. 460; *Lord Minners v. Johnson*, 1 Ch. D. 673.

(n) *Gaskin v. Balls*, 13 C. D. 324. See Chap. XIX., Sect. I., 13, *post*, p. 227, as to restrictive building covenants. See *Jane v. Newdigate*, 10 Ves. 192; and *Cubitt v. Smith*, 10 Jur. N. S. 1123; *Price v. Corporation of Penzance*, 4 Hare, 506.

market-house ; specific performance was ordered. (o) But, again, unless the terms of the contract are sufficiently definite, part performance cannot be relied on as a ground for enforcing it. (p)

(4) WHERE DAMAGES ARE AN ADEQUATE REMEDY.

The Court will not decree specific performance when justice can be sufficiently done by an award of damages. (q)

Object of agreement to be considered.

In considering the question whether damages will afford an adequate remedy for a breach of covenant to build in a building lease, it is to be remembered that the object of inserting in a lease a covenant to erect houses, and to maintain them and yield them up at the end of the term, is to secure the rent. If the rent is not paid, the landlord has no means of protecting himself except by recovering possession of the land, and upon entering into possession he may find that the land is not so valuable as he supposes, or as it was before the demise. (r)

(5) ASSESSING DAMAGES.

In the case of damages, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity against persons who are wrongdoers, in the sense of refusing to perform, and not performing, their agreements. It is an established maxim that, in assessing damages, every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bond-fide* performance of the agreement. (s)

The measure of damages.

For breach of a building covenant, the only criterion by which

(o) *Price v. Corporation of Penzance*, 4 Hare, 506, 509. See *Pembroke v. Thorpe*, 3 Swanst. 437 n.; *Sanderson v. Cockermouth, etc., Ry. Co.*, 11 Beav. 497; *Oxford v. Provand*, L. R. 2 P. C. 135; *Crook v. Corporation of Seaford*, L. R. 10 Eq. 678. See *ante*, p. 59, as to specific performance against lessor after part performance by builder; and Chap. IX., Sect. I. (8), *ante*, p. 125, *et seq.*, as to payment after part performance.

(p) *South Wales Ry. Co. v. Wythes*, 1 K. & J. 186; and see judgment as to non-performance not constituting fraud. As to specific performance of contracts with companies, see *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 28, 33. See *Raphael v. Thames Valley Ry. Co.*, L. R. 2 Ch. 147; *Att.-Gen. v. Mid-Kent, etc., Ry. Co.*, L. R. 3 Ch. 100; *Fortescue v. Lostwithiel & Fowey Ry. Co.*, [1894] 3 Ch. 621. See Chap. V., Sect. III. (2), *ante*, p. 46, as to specific performance in the case of part performance and acquiescence of corporation or companies.

(q) *Wilson v. Northampton, etc., Ry. Co.*, L. R. 9 Ch. Ap. 279. See *ante*, p. 59, as to the right to a lease after laying out money under a verbal agreement.

(r) See *per* Kekewich, J., in *Molyneux v. Richard* (1906), 1 Ch. 41, at p. 44.

(s) *Wilson v. Northampton, etc., Ry. Co.*, L. R. 9 Ch. 279; *ib.*, 285.

damages can be measured is the damage sustained by the plaintiff from the diminished value of the premises. (*l*)

An action for specific performance cannot, under any circumstances, be maintained, after the plaintiff has recovered damages for non-performance of the contract. (*u*)

No specific performance after damages recovered.

SECT. II.—SPECIFIC PERFORMANCE OF AGREEMENTS FOR BUILDING LEASES.

(1) GENERAL RULE.

Upon a contract to build a house and accept a lease of the premises, the Court will grant specific performance of the contract as to the lease, and give damages for not building the house. (*w*)

In a case where parties entered into a preliminary building agreement, intending to execute a more complete and formal contract, the Court refused either to decree specific performance of the agreement or give damages for its breach. (*x*)

Preliminary agreement.

The Court will order the execution of a lease containing covenants to build in accordance with the agreement, so as to give the lessor his remedy for the breach of covenant. (*y*)

Lease to contain covenant to build.

It appears that, though the contract does not in terms so provide, the lease, which the plaintiff will be entitled to call on the defendant to accept, should contain covenants to build in accordance with the contract. (*z*)

Specific performance will not be decreed, where arbitrators fail to agree upon details to be settled by them, (*a*) nor where a plan remains to be approved of by the parties. (*b*)

Not compelled when anything remains to be decided or approved.

(*l*) *Oldershaw v. Holt*, 12 Ad. & E. 590. See also *Wigsell v. School for Indigent Blind*, 8 Q. B. D. 357; *Marshall v. Mackintosh*, 14 T. L. R. 458.

(*u*) See the cases cited, Chap. XI., Sect. II. (2), p. 148.

(*w*) *Soames v. Edge*, Johns. 669, distinguished in *Norris v. Jackson*, 1 J. & H. 319; *Mayor of London v. Southgate*, 38 L. J. Ch. 141; *Kay v. Johnson*, 2 H. & M. 118; *Mubleton v. Greenwood*, 2 De G. J. & Sm. 142; *Oxford v. Provand*, L. R. 2 P. C. 135. See *Lancaster v. De Trafford*, 31 L. J. Ch. 551; *Cory v. Thames Iron Co.*, 11 W. R. 589; *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Hindley v. Emery*, L. R. 1 Eq. 52; *Durell v. Pritchard*, L. R. 1 Ch. 244.

(*x*) *Wood v. Sulcock*, 50 L. T. 251. But see *ante*, p. 31, as to preliminary agreements.

(*y*) *Per* Thurlow, L.C., *Lucas v. Commerford*, 1 Ves. Jun. 235; but see *Moore v. Greg* (1848), 2 Ph. 717; *Oxford v. Provand*, L. R. 2 P. C. 135.

(*z*) *Mayor, etc., of London v. Southgate*, 38 L. J. Ch. 141.

(*a*) *Tillet v. Charing Cross Bridge Co.*, 26 Beav. 419.

(*b*) *Brace v. Wehnert*, 25 Beav. 348. But see *Mayor, etc., of London v. Southgate*, 38 L. J. Ch. 141. See *ante*, p. 57, as to the erection of buildings subject to plans to be approved of. See *ante*, p. 94, *et seq.*, as to architect's certificates; and see *Soames v. Edge*, *supra*; *Stocker v. Wedderburn*, 3 K. & J. 393; *Peto v. Brighton, etc., Ry. Co.*, 1 H. & M. 468.

Nor where there is a risk of forfeiture.

Performance will not be compelled when it would impose on the defendant the risk of forfeiture; (c) and a lessee was not compelled to perform his agreement where his doing so would have involved a breach of a prior covenant not to assign without a license. (d) So, the Court will not compel a defendant specifically to perform an agreement, when the result would be to compel him to commit a breach of a prior agreement with another person. (e) But the Court will look to the fact, by whose act and by whose conduct the forfeiture would be occasioned, and will not permit a defendant to put himself in such a position, as that his performance of the agreement shall create a forfeiture. (f)

Nor where terms are uncertain.

The incompleteness, or the uncertainty in the construction, or in the application, or of the terms of the contract, may afford sufficient grounds for the refusal of the Court to grant a specific performance of the agreement for the lease. (g)

An agreement to take a lease of a house, which was in course of building, when it was "complete, finished, and fit for habitation," was specifically enforced, an expert having first reported that the house was "complete, finished, and fit for habitation." (h)

Where there is default of lessor in collateral agreement.

If a plaintiff has made default in a collateral agreement or representation, upon the faith of which the defendant was induced to enter into an agreement for a building lease, the Court will, in general, refuse specific performance. (i) Plans exhibited may operate as such representations. (k)

(2) WHETHER PART OF AN AGREEMENT WILL BE ENFORCED.

The general rule is, that the Court must be able specifically to execute *every part* of the agreement at the time that its

(c) *Peacock v. Penson*, 11 Beav. 355. See *Fildes v. Hooker*, 3 Madd. 193; *Pegler v. White*, 33 Beav. 403; *Willmott v. Barber*, 15 Ch. D. 96.

(d) *Willmott v. Barber*, 15 Ch. D. 96, *supra*.

(e) *Ib.*

(f) *Helling v. Lumley*, 3 De G. & J. 493.

(g) *Taylor v. Portington*, 7 De G. M. & G. 328; and see *Jeffery v. Stephens*, 6 Jur. N. S. 947. See *ante*, p. 33. *Samuda v. Lawford*, 4 Giff. 42.

(h) *Faulkner v. Llewellyn*, 11 W. R. 1055; 12 W. R. 193. See *Parker v. Tuswell*, 2 De G. & J. 559.

(i) See *Gibson v. Goldsmid*, 5 D. M. & G. 757; *Beaumont v. Dukes*, Jacob, 422. See *per* Lord Cranworth, in *Myers v. Watson*, 1 Sim. N. S. 523.

(k) *Peacock v. Penson*, 11 Beav. 355; *Nurse v. Seymour*, 13 Beav. 254. See *Randall v. Hall*, 4 D. & S. 343; *Tindall v. Castle*, 62 L. J. Ch. 555; *Tucker v. Fowles*, [1893] 1 Ch. 195. See *Piggott v. Stratton*, 1 De G. F. & J. 33, as to the vendor or lessor being compelled to specific performance of such representations in some cases. But see the cases *ante*, Chap. VI., Sect. II., p. 63, *et seq.*, as to plans forming part of the agreement.

interposition is asked for; for the Court will not decree specific performance of part of a contract, (*l*) unless the part which it is impossible to enforce has already been performed, (*m*) or the unperformed part is separable and divisible from the rest. (*n*)

The law with reference to the enforcement of verbal contracts which have been part performed will be found in an earlier chapter. (*o*)

(3) CONSTRUCTION BY COURT OF AGREEMENT.

Although, where an agreement is clear, the Court will act upon its own view of the construction, without regard to the view entertained by the parties, yet, where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction. (*p*)

(4) "SUBJECT TO CONTRACT TO BE SETTLED."

Specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract," will not be enforced. (*q*) But where an agreement for a lease, contained in two letters, included the clause, "a proper lease to be drawn up with all proper clauses, and approved of by me and my solicitor," it was held that the last words did not prevent the letters forming a valid contract. (*r*)

l *Ogden v. Fossick*, 32 L. J. Ch. 73; *Gervais v. Edwards*, 2 D. & W. 80; *Hals v. Croll*, 2 Phill. 60; *Stocker v. Wedderburn*, 3 K. & J. 393; *Scottish North-Eastern Ry. Co. v. Stewart*, 3 Macq. H. L. Cas. 382; *Oxford v. Provan*, L. R. 2 P. C. 135. But see *Barrow v. Scammell*, 19 Ch. D. 175.

m *Hope v. Hope*, 22 Beav. 351; *Dietrichsen v. Cabburn*, 2 Phill. 52.

n For an example of the latter exception, see *Wilkinson v. Clements*, L. R. 8 Ch. 96. See, too, *Louth v. Heaver*, 41 Ch. D. 265; *Strong v. Stringer*, 61 L. T. 470. See also *Green v. Low*, 22 Beav. 625; and *Adams v. Kensington Vestry*, 27 Ch. D. 394, where *Green v. Low*, was distinguished. See also *Blackett v. Bates*, L. R. 1 Ch. Ap. 117.

o *Ante*, Chap. VI., Sect. I. (9), p. 59; and *Barnes v. Dyson*, L. R. 1 H. L. 129, *note*, *ante*, p. 61.

p *Marshall v. Berridge*, 19 Ch. D. 233. See *Preston v. Luck*, 27 Ch. D. 497.

q *Harvey v. Principal, etc., of Barnard's Inn*, 50 L. J. Ch. 750; *Wood v. Sulock*, 50 L. T. 251. See *ante*, p. 31, as to agreements made subject to a contract being prepared.

r *Fadie v. Addison*, 52 L. J. Ch. 80.

(5) BUILDING LEASES TO NOMINEES.

As to when the appointment of a nominee is a condition precedent to right to relief, see *ante*, p. 59.

(6) INJUNCTIONS.

The means of enforcing indirectly the affirmative terms of a contract relating to building, of which the Court could not directly decree specific performance, will be more conveniently dealt with in a future chapter. (s)

(s) See *post*, Chap. XX.

CHAPTER XVII.

DAMAGE TO PROPERTY OR PERSON CAUSED BY BUILDING OPERATIONS.

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SECT. I.—DAMAGE OCCASIONED TO PRIVATE PROPERTY AND PERSONS.

(1) NEGLIGENCE IN PULLING DOWN BUILDINGS.

ALL persons must use due care and skill, and take due, reasonable, and proper precautions in pulling down houses and walls, which rest against, or are in contact with, an adjoining house or wall; and if an injury is sustained from a neglect to exercise such care, skill, and precaution, a wrong is done, and the wrongdoer is responsible for the damage; (a) and it is no answer to an action for damage done, to set forth that the damage was repaired by the defendant before action, although the fact may be given in evidence in reduction of damages. (b) The mere fact of contiguity of buildings imposes an obligation on the owners to use due care and

(a) *Trower v. Chadwick*, 3 Bing. N. C. 334; 6 Bing. N. C. 1; *Walters v. Pfeil*, M. & M. 365; *Davis v. London & Blackwall Ry.*, 1 M. & G. 799; *Addison on Torts* (7th ed.), 379.

(b) *Taylor v. Stendall*, 7 Q. B. 634; *Lemastre v. Davis*, 19 C. D. 281; *Tone v. Preston*, 24 C. D. 739.

skill, in removing the one building, not to damage the other, even though no right to support has been acquired. (*c*) Thus careless excavation of foundations, (*d*) or the underpinning of a party wall, (*e*) may cause injury and a claim for damages. But there is no obligation upon the owner of the building about to be removed to shore up the other building. (*f*)

Where there is no notice of the existence of adjoining building.

Although the fact of contiguity of buildings raises an obligation to use due care and skill in removing one not to injure the other, that obligation cannot arise if, from the circumstance of the latter building being underground or otherwise, the party removing the former has no notice of its existence. (*g*)

But even where the defendant has notice he is not necessarily under obligation, for he may lawfully cause damage intentionally, provided that he acts strictly within his legal rights.

(2) LIABILITY FOR INJURY CAUSED BY BUILDER. (*h*)

General principles.

The employer is liable to third persons for the tortious acts of the builder, where he has expressly authorised or subsequently ratified such acts: for every one, who procures the violation of a right to be done by another, is as responsible as if he did the act himself. (*i*) Moreover, he who procures or authorises an act to be done by another, is responsible for all that the other necessarily does in the execution of his authority. (*k*)

Injuries caused in carrying out a building contract.

If an employer contracts with a builder to do work which can lawfully be done without injury to others, and the builder selects

(*c*) See *post*, p. 329, as to "Support."

(*d*) *Dodt v. Holme*, 1 A. & E. 493; *Massey v. Goyder*, 4 C. & P. 165; *Apperley v. Mark Patrick & Son*, Appendix, p. 669. But see *Chadwick v. Trower*, 6 Bing. N. C. 1. See the London Building Act, *post*, Part III.

(*e*) *Bradbee v. Christ's Hospital (Governors)*, 2 D. N. S. 164. See *Pflugger v. Hocken*, 1 F. & F. 142; *Brown v. Windsor*, 1 C. & J. 20; *Walters v. Pfiel*, M. & M. 362; *Dodd v. Holme*, 1 A. & E. 493; *Chadwick v. Trower*, 6 Bing. N. C. 1; *Percival v. Hughes*, L. R. 8 App. Cas. 433, as to the negligence of pulling down, or building, party walls.

(*f*) *Peyton v. Mayor, etc., of London*, 9 B. & C. 725. See *post*, p. 207, for the cases as to the liability of builder and employer for injury caused by builder in carrying out a contract.

(*g*) *Chadwick v. Trower*, 6 Bing. N. C. 1; and see *Rylands v. Fletcher*, L. R. 3 H. L. 330.

(*h*) As to builder's liability to employer for negligent and defective construction, see Chap. IX., Sect. I. (6), *ante*, p. 116.

(*i*) *Erle, J., Lumley v. Gye*, 2 E. & B. 216. As to subsequent ratification, see *Wilson v. Tummon*, 6 M. & G. 242; *Woollen v. Wright*, 1 H. & C. 554.

(*k*) *Wilson v. Peto*, 6 Moore, 49; *Witte v. Hague*, 2 D. & R. 33; *Hole v. Sittingbourne Ry. Co.*, 6 H. & N. 488; *Addison on Torts* (7th ed.), p. 95.

his own workmen, and has the immediate control over the work, the employer will not, as a rule, be liable for injuries to strangers caused by negligent execution of the work. (l)

So, if the execution of work is entrusted to a builder, who exercises an independent employment, and selects his own workmen, and has the immediate control and superintendence of the work, the owner of the house, who employs the builder, may not be responsible for the creation of nuisances by the negligence of the builder's workmen, if he was ignorant of their unlawful proceedings, and had no knowledge of the probable consequences of their acts. (m) But the employer also may be liable, if he interferes with, or retains control over, the builder. (n) It is immaterial, however, that the defendant lends some of his own men to the contractor, if they are acting substantially as the contractor's servants at the time of the injury. (o)

But where an employer orders a builder to do an act which is unlawful in itself, or which cannot be done without creating a nuisance, then the act done by the builder is in substance the employer's act, and he, as well as the builder, is responsible for the consequences which naturally result from it. (p) For when an employer contracts for the performance of work, which, properly conducted, can occasion no risk to his neighbour's house, which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. (q) But, in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions.

(l) *Rapson v. Cubitt*, 9 M. & W. 710; *Butler v. Hunter*, 7 H. & N. 826; *Reedie v. L. & N.-W. Ry. Co.*, 4 Ex. 244; *Steel v. S.-E. Ry. Co.*, 16 C. B. 550; *Murray v. Currie*, L. R. 6 C. P. 24; *Searle v. Laverick*, L. R. 9 Q. B. 122. See also *Gusford v. Nibbs*, 9 Ex. 702; *Ellis v. Sheffield Gas Consumers' Co.*, 2 E. & B. 767. As to liability of a sub-contractor, see *Oderton v. Freeman*, 11 C. B. 873; *Blake v. Thurst*, 2 H. & C. 20.

(m) *Peachey v. Rowland*, 13 C. B. 185. See *Gray v. Pullen*, 5 B. & S. 970, 981; *Knight v. Fox*, 5 Ex. 725; *Allen v. Hayward* 7 Q. B. 900. But see *Frit v. Hobson*, 14 Ch. D. 542.

(n) *Burgess v. Gray*, 1 C. B. 578.

(o) *Murray v. Currie*, L. R. 6 C. P. 24. But see *Randleston v. Murray*, 8 A. & E. 100; *Michigan v. Wedge*, 12 A. & E. 741; *Murphy v. Caralli*, 3 H. & C. 442.

(p) *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *Hole v. Sittingbourne Ry. Co.*, 6 H. & N. 500; *Blake v. Thurst*, 2 H. & C. 20; *Brownlow v. Metropolitan Bd. of Wks.*, 16 C. B. N. S. 546; *Dower v. Peate*, 1 Q. B. D. 321; affirmed in *Angus v. Dalton*, L. R. 4 Q. B. D. 162, and by House of Lords, *Dalton v. Angus*, 6 App. Cas. 740. See also *Lemaître v. Diers*, 19 Ch. D. 281; *Turry v. Alden*, 1 Q. B. D. 314; and see *Pierard v. Smith*, 10 C. B. N. S. 470. See also *Bryces v. Weston* (1897), 17 N. S. W. R. 81.

(q) *Blake v. Holf* (1898), 2 Q. B. 425.

He is bound, in a question with the party injured, to see that the contract is performed, and is, therefore, liable, as well as the contractor, to repair any damage which may be done. (r)

Interference
with party
wall.

Where A. and B. were owners of adjoining houses, between which was a party wall; and A. employed a builder to pull down and rebuild his house, which involved operations which might imperil the stability of the party wall, and B.'s house was damaged; it was held that A. was liable for the damage, although it was caused by the negligent acts of the builder. (s)

Indemnity
of building
owner.

Where a contract to pull down and rebuild a house contained a clause providing that the builders were to be responsible for loss, damage, or defects, and that they would have to make good the same, and a party wall fell down owing to the negligence of the builder's foreman in making certain holes at the base of the wall. The building owner rebuilt the wall, and sued the builder for the cost of so doing. It was held that he was entitled to recover. (t)

(3) LIABILITY FOR INJURY AFTER CONTRACT COMPLETED.

In the absence of a special agreement, which is sometimes inserted in building contracts, after the building has been properly completed, and the works have been handed over to the employer, the liability of the builder as between himself and the employer ceases; and, for any subsequent injury caused by the natural result of the work, the employer will be responsible. (u)

(4) LIABILITY TO PERSONS COMING UPON PREMISES DURING ERECTION, ETC.

The liability of the builder in respect of injuries sustained by persons coming upon premises during erection or demolition has next to be considered.

In the case of a trespasser, *i.e.* one who has no right to enter the

(r) *Dalton v. Angus*, *supra*.

(s) *Percival v. Hughes*, *Hughes v. Percival*, 8 App. Cas. 443. See this case for other cases there cited as exceptions to the rule. See also *Lemaitre v. Davis*, 19 Ch. D. 281.

(t) *Apperley v. Mark Patrick & Son*, Appendix, p. 669.

(u) *Hyams v. Webster*, L. R. 4 Q. B. 138; *Bartlett v. Baker*, 3 H. & C. 153. See also *Winterbottom v. Wright*, 10 M. & W. 109; *Earl v. Lubbock* (1905), 1 K. B. 253.

premises, he takes the risk upon himself, and the builder cannot be held liable. (*w*)

Where, however, a person is on the premises with the permission of the builder, and for the common interest of himself and the builder, it would seem that there is a duty upon the builder to take reasonable care. (*x*)

(5) INJURIES OCCASIONED BY WORKS IN OR NEAR A HIGHWAY.

In a case where a contractor had been employed by a district council to effect certain repairs to a road, and had left materials upon the road unfenced and unguarded, by reason of which the plaintiff sustained an injury, it was held that the district council were liable for the negligent acts of the contractor's workmen. (*y*)

Upon the principle of the foregoing cases, where a builder is engaged in erecting, repairing, or demolishing a building abutting on a highway, and during the conduct of the works injury is caused to some one using the highway, the building owner may in certain circumstances be held liable. And the fact that some article falls on the plaintiff from the defendant's premises is *prima facie* evidence of negligence. (*z*)

(6) LIABILITY OF OFFICERS AND SERVANTS.

The employer who authorises the doing, and the officer or servant who does, an act of trespass or other unlawful act, may be made responsible as principals, and sued jointly for damages. (*a*)

General rule
In case of
unlawful act
or trespass.

The master is not always liable for the acts of the servant. His liability is confined to cases in which the servant is acting in the course of his employment, and for the master's benefit. (*b*) If the servant is acting in obedience to the express orders of his

Limitation
of master's
liability.

(*w*) *Gautret v. Egerton*, L. R. 2 C. P. 371; *Ivay v. Hedges*, 9 Q. B. D. 80; *Butcher v. Fortescue*, 11 Q. B. D. 474; *Tolhausen v. Davies*, 58 L. J. Q. B. 98. But see *Harold v. Watney* (1898), 2 Q. B. 320.

(*x*) See *Holmes v. N.-E. Ry. Co.*, L. R. 4 Ex. 254; *Harris v. Perry & Co.* (1903), 2 K. B. 219. And see *Clerk and Lindell on Torts* (4th ed.), p. 496, et seq.

(*y*) *Penny v. The Wimbledon U. D. C.* (1898), 2 Q. B. 213, following *Hardaker v. Idle D. C.* (1896), 1 Q. B. 335.

(*z*) *Byrne v. Boodle*, 2 H. & C. 722; *Bennett v. Castle & Sons*, 14 T. L. R. 288.

(*a*) *Bates v. Pilling*, 6 B. & C. 38; *Hutchinson v. York & Newcastle Ry. Co.*, 5 Ex. 350. So also a surveyor of a highway board obeying the orders of the board, *Mill v. Hawker*, L. R. 10 Ex. 92.

(*b*) *Mitchell v. Grassmeller*, 13 C. P. 237; *Limpus v. London General Omnibus Co.*, 1 H. & C. 525.

master, the latter must be held to have contemplated the necessary or obvious consequences of obeying the order. (c)

Action
against
master
or servant.

If labourers are hired to do the employer's work by a servant, an action for the negligence of such labourers can only be brought against the labourer who is the cause of the injurious consequences, or against the employer, or both jointly; (d) for the servant, who merely hires the labourers to do such work, is not personally responsible. But it seems that a clerk who superintends the erection of a building, by which ancient lights are darkened, and who alone directs the workmen, is responsible, as well as the builders who appointed him to superintend the progress of the building. (e)

SECT. II.—DAMAGE CAUSED TO HIGHWAYS.

(1) GENERAL PRINCIPLES AS TO USER OF HIGHWAYS.

The right of a landowner to use a public highway, for the purpose of bringing materials for the building of a house on his land, must be exercised reasonably. If there are several ways of access to the land, there is no absolute right to use the most convenient way exclusively, without regard to the convenience of neighbouring landowners. So, the owner of a house is entitled to recover damages from a person who, by an unreasonable use of the highway, interferes with his *private* right to access from his house to the highway. He can recover damages in respect of loss of custom in the business which he carries on in his house. Moreover, in the case of substantial injury, he is entitled to recover damages on the ground that he has suffered a particular injury from a *public* nuisance. (f)

Unreasonable
user.

Rubbish on
highway.

Any person laying any timber, stone, or other matter or thing whatever on a highway, either to the injury of the highway, or to the injury, interruption, or danger of any person travelling thereon,

(c) *Gregory v. Piper*, 9 B. & C. 591.

(d) *Stone v. Cartwright*, 6 T. R. 411; *Wilson v. Peto*, 6 Moore, 49. See also *Kitchen v. Campbell*, 3 Wils. 304; *Bird v. Randall*, 3 Burr. 1345; *Slade's Case*, 4 Co. 946; *Phillips v. Berryman*, 3 Doug. 288; *Wadsworth v. Bentley*, 23 L. J. Q. B. 3; *Kendal v. Hamilton*, 4 A. C. 516.

(e) *Wilson v. Peto*, 6 Moore, 47; *Monks v. Dillon*, 12 L. R. (Ir.) 321.

(f) *Fritz v. Hobson*, 14 Ch. D. 542. See cases there cited; and see *Barber v. Penley*, [1893] 2 Ch. 447; *Benjamin v. Storr*, L. R. 9 C. P. 400, *per* Honeyman, J.; *Pratt and Mackenzie on Highways* (15th ed. 1905), pp. 113, 114.

is liable to a penalty under the Highway Act, 1835. (g) This section creates two offences, the first offence referring to the injury to the highway, the second, to the injury, etc., of any person travelling thereon. (h)

(2) EXTRAORDINARY TRAFFIC ON HIGHWAYS. (i)

In the conduct of building operations, or the performance of a contract for large works, it is often necessary for a builder or contractor to make something more than an ordinary use of the highway. Thus he may require to use traction engines or heavy motor lorries for the transport of stone and other materials. Although the use of a traction engine upon a highway in such manner as to cause a nuisance by tearing up the road and putting it in a bad condition may be restrained by injunction, (k) the law provides a much more drastic remedy, which is of the first importance to builders and contractors.

Use of
traction
engines, etc.

It is provided by the Highways and Locomotives (Amendment) Act, 1878, (l) s. 23, as amended by the Locomotives Act, 1898, (m) s. 12, that where by a certificate of their surveyor it appears to the authority which is liable to repair any highway, whether a main road or not, that having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from the person by or in consequence of whose order the weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic. If the claim do not exceed £250 the action may be brought in the County Court. If it exceed that amount, it must be brought in the High Court.

Provisions of
the Highways
and Locomo-
tives Act,
1878.

The person against whom expenses are recoverable may, however, enter into an agreement with the authority for the payment of a

Agreement
with highway
authority.

(g) 5 & 6 Will. IV., c. 50, s. 72.

(h) *Smith v. Perry*, 22 T. L. R. 158. See also the Scotch case of *Horsburgh v. Macch* (1900), 3 F. 268.

(i) For a summary of the law on this question, see *Pratt and Mackenzie on Highways* (15th ed. 1905), p. 481.

(k) *Att.-Gen. v. Scott* (1901), 1 K. B. 404.

(l) 41 & 42 Vict. c. 77.

(m) 61 & 62 Vict. c. 29.

composition in respect of such weight or traffic, and thereupon he shall not be subject to any proceedings. (*n*)

Several questions of importance to builders arise upon the construction of these provisions. Indeed, in the case of a large contract, it may become necessary for the builder to consider whether a special clause should not be inserted to make it clear that if any damage is done to the highway by the hauling of building material, the building owner must be held responsible. (*o*)

It is hoped that the following observations will serve to explain the builder's position.

(*a*) *Meaning of "Extraordinary Traffic."*—"Extraordinary traffic," as distinct from "excessive weight," includes all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair.

The section does not mean that a man is to be mulcted, merely because he uses a road more than others do, even if it be his own user which has produced the mischief to the road. The traffic must be extraordinary as regards the ordinary user of the road as a whole by all who use it, and not merely large as regards the traffic put on the road by other persons. (*p*)

(*b*) *When does Extraordinary Traffic become Ordinary?*—It is submitted that traffic in its inception extraordinary, may under certain circumstances cease to be extraordinary, and become ordinary after a certain lapse of time; but this could scarcely be the case where the occasion of the extraordinary traffic was a temporary matter, such as the erection of a particular building, or block of buildings.

(*c*) *Contributory Negligence no Answer.*—In estimating what damage has been sustained owing to extraordinary traffic, the Court is not at liberty to apply the doctrine of contributory negligence on the part of the highway authority in not repairing or keeping the road in repair. (*q*)

(*d*) *Extraordinary Expenses.*—The question what are extraordinary expenses must be determined, having regard to the average expense of repairing highways in the neighbourhood. (*r*)

(*n*) Highways Act, 1878, s. 23.

(*o*) See a precedent of such a clause, *post*, 379 *n*.

(*p*) *Hill v. Thomas* (1893), 2 Q. B. 333. See also *Tonbridge Highway Bd. v. Sevenoaks Highway Bd.*, 49 J. P. 340; *Whitebread v. Sevenoaks Highway Bd.* (1892), 1 Q. B. 8; *Etherley Grange Coal Co. v. Auckland Highway Bd.* (1894), 1 Q. B. 39; *Lower Strafforth Highway Bd. v. Hatfield Chase Co.*, 57 J. P. 567.

(*q*) *Hemsworth R. D. C. v. Mickethwaite*, 68 J. P. 345.

(*r*) *Williams v. Davies*, 44 J. P. 347. See also *Savin v. Oswestry Highway Bd.*, 44 J. P. 766; *Epsom U. D. C. v. L. C. C.* (1900), 2 Q. B. 751.

The expenses recoverable are not the expenses incurred by the actual damage caused, but a proportionate part, representing the excess over the average expenses of repair. It would be unjust to charge the party occasioning the damage with the whole expense of reinstating the road. (s)

Expenses not necessarily the actual damage.

(c) *Liability for Extraordinary Expenses.*—As already stated, extraordinary expenses may be recovered from the person by, or in consequence of whose order the weight or traffic was conducted. (t) The words "or in consequence of" were inserted owing to a decision (u) that the words "by whose order" did not impose any liability upon the building owner for whose benefit the traffic was conducted, although he knew that the contractors intended to send the materials along the highway by traction engines and trucks.

Meaning of words "or in consequence of."

The question whether the builder or the building owner is liable, however, still appears to be a question of fact for the Court to determine. (x)

Liability a question of fact.

The proceedings under this Act are in the nature of an action for a personal tort, and therefore cannot be taken against the executor of a person by whose order the extraordinary traffic was conducted. (y)

(f) *When Proceedings must be commenced.*—Proceedings for the recovery of any expenses incurred after the passing of the Act of 1898 (June 1, 1899) must be commenced within twelve months (z) of the time at which the damage has been done, or, where the damage is the consequence of any particular building contract, or work (a) extending over a long period, must be commenced not later than six months after the completion of the contract or work.

When proceedings are taken against a public authority the limitation of six months imposed by the Public Authorities Protection Act, 1893, does not apply to actions under this section. (b)

(s) *Per Field, J., Pool Highway Bd. v. Gunning*, 46 J. P. 708. See also *Williams v. Davies*, 44 J. P. 347; *Lord Aveland v. Lucas*, 5 C. P. D. 211, 351.

(t) *Highways and Locomotives (Amendment) Act, 1878*, s. 23; *Locomotives Act, 1898*, s. 12.

(u) *Kent C. C. v. Lord Gerrard* (1897), A. C. 633, followed in *Pethick v. Pether* C. C., 62 J. P. 579. See also *Laythorn v. Harrey*, 49 J. P. 709; *Burgett v. Hoo L. Bd.*, 46 J. P. 805; *Kent C. C. v. Fuller*, [1895] 1 Q. B. 448. The effect of this amendment is well illustrated by the case of *Fyfe v. L. C. C.* (1900), 2 Q. B. 751.

(x) *Egham R. C. v. Gordon* (1902), 2 K. B. 120.

(y) *Story v. Sheard* (1892), 2 Q. B. 515.

(z) *Locomotives Act, 1898*, s. 12 (1) (b). As to the construction of this provision, see *Fyfe v. L. C. C.* (1900), 2 Q. B. 751, *ubi supra*.

(a) As to the meaning of this term, see *Norfolk C. C. v. Green*, 61 J. P. 223.

(b) *Kent C. C. v. Folkestone Corporation* (1905), 1 K. B. 620.

CHAPTER XVIII.

RENT AND RENT-CHARGES, AND APPORTIONMENT IN BUILDING LEASES AND GRANTS.

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Preliminary.—For the purposes of this work it is only necessary to treat of the law relating to apportionment of rents, and the mode of severing land held subject to one rent.

SECT. I.—BUILDING LEASES.

(1) RENT AS BETWEEN LESSOR AND LESSEE.

At common law there were three kinds of rent: 1. Rent-service; 2. Rent-charge; 3. Rent-seck. Wherever the relation of landlord and tenant exists and a rent is reserved, it is a rent-service, for which there is a common law right of distress. It is absolutely necessary for the creation of rent-service that a reversion remain in the lessor. The expression "ground-rent," which is one very carelessly used, (a) as a rule is intended to mean rent-service, less than the rack-rent of the premises out of which it issues, at which land is let for purposes of improvement by building. (b)

(a) *Evans v. Robins*, 8 Jur. N. S. 846.
 (b) *Stewart v. Alliston*, 1 Mer. 26; *Bartlett v. Salmon*, 1 Jur. N. S. 278, reversed 6 De G. M. & G. 33; and see *Lecoy v. Mogford*, 2 Jur. N. S. 1084.

(2) APPORTIONMENT OF THE BENEFIT OF RENT-SERVICE. (*b*)

Rent-service can be apportioned in various ways:

(*a*) *By operation of Law*.—This arises when the reversion in lands which are demised at an entire rent becomes divided between different persons, as, if freehold and copyhold lands are demised at one entire rent, and the copyholds descend to one and the freeholds to another; (*c*) so, with freeholds and leaseholds, an apportionment among the real and personal representatives takes place on the death of the lessor. (*d*)

(*b*) *By act of Lessor*.—This arises where a lessor disposes, by deed or will, of part of the reversion of the land from which the rent arises. In such case a proportionable part of the rent passes immediately with the part of the reversion disposed of, without any express mention being made of it. (*e*) The general consequence of the apportionment is that the lessee is liable to several actions or distresses for the rent by the respective owners of the several parts thereof. If the proportions in which the rent is to be divided have been fixed with the tenant's consent, each owner of an apportioned part of the rent can distrain or bring his action for his part of the rent; but, if the tenant's consent to the apportionment has not been obtained, the proper course is for one of the owners of the reversion to bring an action for his proportion of the rent, and the proportion to which he is entitled will then be ascertained by the jury, (*f*) or by a judge in the position of a jury. (*g*) It seems clear that, until the exact proportion is thus ascertained, the owner of part of the reversion cannot distrain.

The owner of part of a reversion can recover on the covenant to pay rent from the original lessee or his personal representatives, although, the lease having been assigned, the claim is based not on privity of estate, but privity of contract. (*h*) The owner of a

(*b*) For two forms of deed for apportioning rents, see *L. T. Newsp.*, Vol. 118, pp. 522, 590.

(*c*) *Harding's Case*, Godb. 139.

(*d*) *Huntley v. Roper*, 1 Anl. 21; *Moody v. Garmon*, 1 Roll. Abr. 237 (D. 5); *Lee v. Arnold*, Vin. Abr. (Rent G. a 8); and see *Doe d. Vaughan v. Meyler*, 2 M. & S. 276; *Rushden's Case*, Dyer, 46; *Ever v. Mayle*, Cro. Eliz. 771.

(*e*) *Goodwin v. Parker*, 2 Jones, 1; *Roberts v. Carr*, Raym. 10; *Ards v. Watkin*, Moor. 540; *Austin v. Smith*, 1 Leon. 315; *Brownlow v. Hewley*, 1 L. & L. Raymond, 82; *Swansea (Mayor of) v. Thomas*, 10 Q. B. D. 48; *Gilbert on Rents*, p. 173.

(*f*) *Bliss v. Collins*, 5 B. & Ad. 876; *Walter v. Maunde*, 1 Jac. & W. 181.

(*g*) *Swansea (Mayor of) v. Thomas*, *supra*.

(*h*) *Ib.*

reversion can also recover from the original lessee, although his assignee has surrendered part of the land. (*i*)

By act of
lessee.

(*e*) *By Act of Lessee*.—This may arise where the lessor purchases part of the land, when the rent-service will not be extinguished but apportioned, either according to express agreement of the parties, or according to the value of the land. (*k*) So, if the lessee redemise part of the premises to the lessor without reserving any rent, but not if a new rent be reserved on such redemise, (*l*) or accept a new lease of part of the land comprised in the former demise. Eviction from part of the lands by title paramount to that of the lessor may also effect an apportionment of the rent. (*m*)

(3) COVENANTS AND CONDITIONS OF RE-ENTRY ON SEVERANCE OF REVERSION.

The assignee of part of the reversion is in the same situation with regard to covenants running with the land as he is with respect to the rent, but formerly was not so with respect to conditions of re-entry; now, however, where the reversion is severed and the rent is *legally apportioned*, the assignee of each part has the benefit of all powers or conditions of re-entry for *non-payment of the original rent*, (*n*) and, as to leases made after December 31, 1881, the 10th and 12th sections of the Conveyancing Act, 1881, (*o*) provide for the apportionment of all covenants and *all* conditions of re-entry.

(4) APPORTIONMENT OF BURDEN OF RENT-SERVICE.

Although, as we have seen, there are cases in which the lessor can compel the lessee to pay his rent in proportionate parts, yet the lessee has no corresponding power of compelling the lessor to accept payment otherwise than in one sum. And it is to be borne

(*i*) *Baynton v. Morgan*, 22 Q. B. D. 76.

(*k*) *Gilbert on Rents*, p. 152.

(*l*) *Hodgson v. Thornborough*, 2 Lev. 143; *Hodgkins v. Robson*, Vent. 276; *Lloyd v. Langford*, 2 Mod. 174. See Co. Lit. 148 a; *Smith v. Malings*, Cro. Jac. 160.

(*m*) Co. Lit. 148 b; *Smith v. Malings*, *supra*. See further as to apportionment by act of lessee, *Stevenson v. Lambard*, 2 East, 580; *Ganmon v. Vernon*, 2 Lev. 231; *Orgill v. Kemshead*, 4 Taunt. 642; and see *Curtis v. Spitty*, 1 Scott, 742.

(*n*) The Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 3.

(*o*) See notes to these sections in *Hood and Challis's Conveyancing Acts* (6th ed.), pp. 53, 58.

in mind that the mere reservation of distinct rents will not necessarily convert the one lease in which they are contained into several leases; and, consequently, that a general condition for re-entry will extend over the whole premises, notwithstanding that only one of the rents be in arrear. (*p*) But distinct rights of re-entry into distinct parts of the premises *may* be reserved on non-payment of the rent, or non-performance of the covenants incident to those distinct parts. (*q*)

When some of several houses held under one lease are to be assigned or sub-leased, considerable inconvenience is experienced from the entire ground rent, with its attendant power of distress and right of re-entry affecting all the houses, as the lessor is able to re-enter upon the whole of the land for breach of covenant in any part, and each assignee or sub-lessee is liable to be distrained on by the superior landlord, in the event of the head rent being unpaid by some person over whom he has no control. (*r*)

SECT. II.—BUILDING GRANTS. (*s*)

(1) RENT AS BETWEEN GRANTOR AND GRANTEE.

Rent in these cases is either a rent-charge, if a power of distress is reserved by the deed of grant, or rent-seek, (*t*) if there is no such power. A rent-charge is an annual sum granted or reserved out of lands by deed or will, with a power of distress, the distinction between this and rent-service being that the grantor retains no reversion in the land. The Conveyancing Act, 1881, now gives a power of distress for all annual sums (limited after 1881) arising out of any land except for rents incident to a reversion, with further powers to enter and take the income of the land, and, whether taking possession or not, to demise by deed the land charged, or any part thereof, to a trustee for a term of years, on trust to raise by sale, mortgage, or demise, all arrears of rent and costs.

Ordinary rent-charges are often called "fee farm rents," but, Fee farm
rents;

(*p*) *Winter's Case*, Dyer, 308, b; *Appel v. Nourour*, Moore, 97. See *Hobbs v. Hopkins*, 4 L. n. 8.

(*q*) *Knight's Case*, 5 Co. 54 b; *Tafield v. Rogers*, Cro. Eliz. 341; *Gill v. Gents*, 34, 35.

(*r*) See *Wilkinson v. Clements*, L. R. 8 A. C. 96, *ante*, p. 58; and *Lowther v. Heaver*, 41 Ch. D. 248. See also *Pultenay v. Cavan*, 5 T. R. 567.

(*s*) See form of grant, F. XXXII., *post*, p. 448.

(*t*) All rents are now practically rent-charges, inasmuch as a power of distress is given by 4 Geo. II. c. 28, s. 5, and by the Conveyancing Act, 1881, s. 44. See *Re Lord Gerard and Beecham's Contract*, [1894] 3 Ch. 295.

chief rents.

strictly speaking, a fee farm rent is a rent *service* reserved on a grant of a fee, which, of course, cannot be made since Statute *Quia Emptores*; they are also called chief rents, particularly in Lancashire, though, strictly, a chief rent is a rent *service* paid by freeholders in lieu of all feudal service.

(2) APPORTIONMENT OF BENEFIT OF RENT-CHARGES.

Formerly a rent-charge could not be apportioned, "because the rent is entire and against common right and issued out of every part of the land." (*u*) But there were exceptions: a rent-charge was apportioned where part of the land charged and the rent-charge became vested in the same person *by descent* (*w*) (but otherwise where it happens by devise, (*x*) in which case the whole rent is extinguished); or where the owner of the rent-charge gave *part* of the rent to a stranger, and the tenant attorned (*y*) (which would not be necessary now). And, where the rent-charge was granted to the owner of the land and to a stranger, the rent became extinguished as to a moiety only. (*z*)

Where owner
purchases
part of land.

But, if the owner of the rent purchases part of the land subject to it, the whole rent is extinguished; (*a*) or, formerly, if part of the land was released from the rent-charge, unless there was a proviso in the deed that the remainder of the land should continue subject to the rent-charge, such proviso operating as a new grant of the rent-charge, (*b*) though in such case the new rent-charge would, it seems, be subject to any incumbrances which had been created between the original grant of the rent and the implied new grant.

Release of
part of land
from rent-
charge.

But the owner of a rent-charge may release to the tenant of the land part of the rent and reserve part. (*c*) So he may grant part of the rent-charge to another, and the rent-charge is divided. (*d*)

The rule that the release of part of the land from the rent extinguished the whole rent occasioned considerable difficulty in practice, to remedy which the Law of Property Amendment Act,

(*u*) Co. Lit. 147 b.

(*w*) *Ib.*, 149 b.

(*x*) *Dennett v. Pass*, 1 Bing. N. C. 388.

(*y*) Co. Lit. 148 a.

(*z*) Co. Lit. 149 b. See also, as to apportionment of rent-charges, *Hartley v. Maddocks* (1899), 2 Ch. 200.

(*a*) Lit. 222.

(*b*) Co. Lit. 148 a.

(*c*) *Ib.*

(*d*) *Ib.*

1859, (e) s. 10, was passed. (f) It is not clear that this section would include a purchase of part of the land by the owner of the rent, and it would seem advisable in such case to first release the land to be purchased from the rent.

(3) APPORTIONMENT OF BURDEN OF RENT-CHARGE.

Sect. 10 of the Inclosure Act, 1854, (g) enacts that in all cases Inclosure Act. where any hereditaments are charged with any fee farm rent, rent-suck, rent of assize, or chief rent, or other annual or periodical fixed rent, or other certain payment, any persons respectively interested in such lands and in the said rent issuing therefrom may apply in writing to the Inclosure Commissioners (now the Board of Agriculture and Fisheries (h)) to apportion the said rent among the lands charged. Such an apportionment is made by an order of the Board, and the lands become chargeable in respect of the rent only in manner and to the extent set forth in the order. (i)

This Act enables an apportionment to be made where the owner of the rent is under some disability. (k)

(e) 22 & 23 Vict. c. 35.

(f) *Booth v. Smith*, 11 Q. B. D. 318.

(g) 17 & 18 Vict. c. 97.

(h) See Board of Agriculture and Fisheries Act, 1903.

(i) Ss. 11, 12, and 13 of 17 & 18 Vict. c. 97. In the fifth edition of *Davidson*, vol. i., by Wright and Darley, it is stated that rent reserved on leases for lives or years can be apportioned under this Act.

(k) See, too, Settled Land Act, 1882, s. 8 (3).

CHAPTER XIX.

COVENANTS IN BUILDING LEASE.

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SECT. I.—BUILDING COVENANTS.

(1) GENERAL OBJECTS.

BUILDING covenants may, in general, be said to be inserted in building agreements, leases, and conveyances, with the object of providing for the building of houses of prescribed description and value, restricting user of the land in prescribed manner, the making of roads, sewers, drains, and other similar objects.

Although the vendor propose to sell the whole of his land absolutely, yet, if he does so in several lots, it will be important to insert restrictive covenants to prevent the land being used for purposes other than those for which it is sold, for otherwise some lots may be used in such a way as to decrease the value of the remaining lots.

(2) EFFECT OF COVENANT TO BUILD.

A covenant by a person to build such a house as he should think fit, binds him to nothing, as a promise cannot be conditional on the mere will of the promiser. (*a*)

According to a technical rule of the common law, a covenant to complete certain houses within a limited time was not effectively altered by a parol agreement extending the time. (*b*) So, a covenant in a lease to build certain buildings during the term, was not discharged by a verbal request not to commence the building until requested. (*c*) But now, under the Judicature Acts, the above rule of the common law has been practically superseded. If a man enter into a covenant to build or not to build, and an Act of Parliament, subsequent to the contract, renders it impossible of performance, the covenant is discharged. (*d*)

Alteration of covenant to build by parol agreement.

Effect of Act of Parliament.

Where a lessee covenanted to repair buildings comprised in the lease, and, further, within the first fifty years of the lease to take down the demised messuages *as occasion might require*, and in their

(*a*) *Fosher v. Williams*, L. R. 20 Eq. 210; *Andrew v. Aitken*, 22 C. D. 218.

(*b*) *Lutler v. Holland*, 3 T. R. 590. See Chap. XI., p. 136, as to time conditions generally.

(*c*) *Corbuent v. Hunt*, 8 Taunt. 596.

(*d*) *Doe d. Angleson (Lord) v. Rugeley*, 6 Q. B. 107; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; and see *ante*, p. 192, *et seq.*, as to performance of contracts with respect to building, etc., becoming impossible. See *Long Eaton Recreation Grounds v. Midland Ry. Co.* (1902), 2 K. B. 574, as to land entitled to the benefit of a restrictive covenant being "injuriously affected," within s. 63 of the Lands Clauses Act, 1845.

place erect not less than four other good and substantial brick messuages, it was held that, if the lessor had the original houses substantially as good as new in the course of the fifty years by being repaired, the covenant would be satisfied and the lessee need not actually rebuild. (e) But where certain premises in a state of dilapidation were demised, and the lessee covenanted to *new build* the brick houses within three years, he was compelled to rebuild the whole, it being held that making extensive repairs by pulling down and rebuilding the fore and back fronts was not a performance of the covenant. (f)

Conduct of
the landlord.

If the landlord by his conduct induces the tenant to believe that performance within the stipulated time will not be insisted on, he cannot afterwards treat the non-performance within the time as a ground of forfeiture. (g)

The ordinary covenant with regard to building, where a ground rent or rent-charge is reserved or limited, is that the covenantor shall build within a definite period of no long duration, generally two years at the most. (h)

A covenant to build an additional house at any time at the request of the grantor is not "usual," and a purchaser who has contracted for the purchase of land subject to such a covenant, upon a representation that there are no unusually restrictive covenants, is entitled to be relieved from his contract. (h)

(3) WAIVER OF BREACH OF COVENANT TO BUILD.

Where a tenant has covenanted to build, a breach of the covenant may be waived by acceptance of rent. So where a lease contained a licence to the defendants to pull down a house within twelve months, it also contained covenants by the defendants (a) within the same period to erect new premises in their place, and (b) to "at all times during the said term keep the said messuages so to be erected as aforesaid in good and substantial repair." The lease also contained a proviso for re-entry in case of non-observance of covenants. The new houses were never built, and after the date

(e) *Evelyn v. Raddish*, 7 Taunt. 411; S.C., Holts. N. P. C. 543. See *Bennett v. Herring*, 3 C. B. N. S. 370; *Jacob v. Down* (1900), 2 Ch. 156; and at p. 223, *post*.

(f) *City of London v. Nash*, 3 Atk. 512; S.C., 1 Ves. Sen. 12; *Doe v. Withers*, 2 B. & Ad. 896.

(g) *Birmingham & District Land Co. v. L. & N.-W. Ry. Co.*, 40 C. D. 268. See also *Gibbon v. Payne*, 22 T. L. R. 54.

(h) *Andrew v. Aitken*, 22 Ch. D. 218; *Rosher v. Williams*, L. R. 24 Eq. 210. See also *Keppell v. Bailey*, 2 My. & K. 517, 535.

when they should have been completed, rent was accepted by the lessor. It was held (a) that acceptance of rent was a waiver of the breach of the building covenant; (b) that there was no continuing breach of the covenant to build; (c) that there was a continuing breach of the repairing covenant. (i)

(4) WHAT BUILDINGS MAY BE ERECTED.

Where the lease of a farm for a term of years contained a reservation to the landlord of a right to sell part of the farm for "building sites," allowing £2 off the annual rent for every acre so sold, it was held that "land for building sites" was a well-understood expression, referring to something in the nature of shops or dwelling-houses; and that the landlord was not entitled, against the tenants' will, to sell part of the farm as a site for a small-pox hospital. (k)

A covenant not to build more than one house on a plot of land is not contravened by building a block of flats upon that plot. (l) But a building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constitutes two houses within the meaning of a covenant not to erect more than one house on the site. (m)

(5) COVENANT RELATING TO ELEVATION OR FORM.

If a building has been erected in a form that is in violation of a covenant, the Court may restrain the defendant from using the building; (n) or, as has already been seen, (o) may compel him to alter the elevation, or form, of the building, so as to conform to the terms of the covenant. (p) But when there is an agreement in the

(i) *Jacob v. Down* (1900), 2 Ch. 156. See also *Gibson v. Payne*, 22 T. L. R. 54.

(k) *English v. Tynemouth Corporation*, 67 J. P. 239. See also *Long Eaton Recreation Grounds v. Molland Ry. Co.* (1902), 50 W. R. 120, cited, *post*, p. 226; *Rogers v. Hasegood* (1900), 2 Ch. 388, cited, *post*, p. 230. See also *Clarke v. Waddington*, Appendix, p. 663, where the substitution of stone steps for an iron ladder was held to be a breach of a covenant not to erect any other building.

(l) *Kimber v. Admans*, 16 T. L. R. 207.

(m) *Iford Park Estates, Ltd. v. Jacobs* (1903), 2 Ch. 522; and p. 230, *post*.

(n) *Warden of Dover Harbour v. South-Eastern Ry. Co.*, 9 Hare, 493.

(o) *Ante*, p. 199, *et seq.*, under Specific Performance. See *Manners v. Johnson*, 1 C. D. 673, *ante*, p. 199.

(p) *Franklyn v. Tuten*, 5 Madd. 469; *Coles v. Sims*, Kay, 56. See *Sinderson v. Cockermouth Ry. Co.*, 11 Beav. 497; *Storer v. G. W. Ry. Co.*, 2 Y. & C. C. C. 48; *Child v. Douglas*, Kay, 560.

first instance, it is advisable, in the interest of the lessor, that a clause should be inserted therein, to the effect that the lessor shall not be bound to grant a lease of any part of the land, so long as a house is standing which shall have been erected contrary to the provisions of the agreement.

It may be mentioned that the mere failure to take proceedings against a person who has been guilty of a breach of a covenant relating to elevation or form is not such acquiescence as will prevent the right to restrain a subsequent breach.^(r) See further as to acquiescence, p. 246, *post*.

(6) COVENANT TO "REBUILD."

Meaning of such covenant.

A covenant by a lessee to "rebuild" a house on the site of the demised messuage, which he covenants to pull down, involves no obligation to erect the new house in the same manner, style, and shape, or with the same elevation, as the old building.^(s) If it is intended, therefore, that the house should be rebuilt in the same style, the covenant should be so framed as to clearly express this agreement.

(7) COVENANT RELATING TO AMOUNT TO BE EXPENDED.

Covenant to build house of stipulated value.

In order to ensure the erection of a particular class of houses upon a building estate, a covenant is sometimes inserted, that the lessee shall not erect certain houses which shall be of a less yearly letting value than a certain sum, or which shall be below a stipulated value.

What is a breach of such covenant.

A covenant to the effect that private houses only, of a certain minimum value, are to be built on several plots of land, is not broken by the erection on one of them of a stable with a bedroom over it, of such dimensions, and in such a position, that it would still be possible to build a house of the stipulated value upon the plot.^(t) But a covenant not to build a house of less value than £400 on certain land, was held to be broken by building two houses with certain common conveniences, each of less value than £400, but together of greater value.^(u)

^(r) *Child v. Douglas*, Kay, 560.

^(s) *Low v. Innes*, 4 De G. J. & S. 286.

^(t) *Russell v. Baber*, 18 W. R. 1021; *Blake v. Marriage*, 9 T. L. R. 569.

^(u) *Snow v. Whitehead*, 53 L. J. Ch. 885.

(S) COVENANT TO BUILD TO SATISFACTION OF ARCHITECT. (r)

If a le-see enter into a covenant to complete certain buildings, "under the direction and to the satisfaction of the surveyor" of the le-ssor, the appointment of such surveyor is a condition precedent to the performance by the lessee of his covenant to complete the buildings. (r) But in *Jones v. Cunnick*, (y) where the covenant was to erect certain buildings within a fixed time, "the whole of which were to be left to the superintendence of the plaintiff and the defendant's son;" it was held that the covenant to erect the buildings was an absolute covenant; and the clause, respecting the superintendence, merely granted the liberty for the parties to superintend, but did not impose any duty, so as to make the superintendence a condition precedent or concurrent. And this decision appears to give the sounder view, with respect to covenants of this description. (z)

Appointment
of architect
condition
precedent
under such
covenant.

(9) NOT TO BUILD ON ADJOINING LAND.

A covenant, entered into by the owner of certain land with a purchaser, that an adjoining plot "should never be hereafter sold, but left for the common benefit of both parties and their successors," is enforceable, (a) and does not contravene any rule of law. (b)

Meaning of
"adjoining."

When land is sold in lots, and there are mutual restrictive covenants by the purchasers, that the land shall not be used so as to create a nuisance to the original vendor, or the occupiers or proprietors for the time being of the "adjoining" property, the word "adjoining" means the property adjoining each lot, and not merely the property adjoining the whole piece of land originally sold; and the owner of any lot is entitled to enforce the covenant against the owner of any other lot. (c)

(r) See F. XIX., Cl. 3, *post*, p. 405.

(s) See Cl. p. VIII., Sect. II., p. 91, as to the approval of the architect or surveyor being a condition precedent. *Combe v. Green*, 2 D. N. S. 1023. See *Forster v. Suttan*, 9 M. & W. 795; *Hunt v. Bishop*, 8 Ex. h. 675; *Hunt v. Bishop*, 9 Ex. h. 635.

(y) *Jones v. Cunnick*, 3 H. L. Cas. 700. See *Dalman v. King*, 4 Bing. N. C. 105.

(z) See *Wignell v. School for Indigent Blind*, 43 L. T. 212, as to covenants to build being absolute or conditional.

(a) *McLean v. McKay*, L. R. 5 P. C. 327.

(b) *Id.*

(c) *Harrison v. Good*, L. R. 11 Eq. 338. See also *Haynes v. King*, [1893] 3 Ch. 440.

(10) WHERE PERMISSION NECESSARY.

A person who has purchased land under a condition prohibiting building thereon except after permission obtained, will be restrained from building before obtaining the permission required. (*d*)

(11) RESTRICTION AS TO BUILDING WITHIN CERTAIN DISTANCE, OR GENERALLY.

If a person covenant not to erect any building upon land to a greater height than is prescribed, within a certain distance from other property, he will be restrained according to the terms of the covenant. (*e*)

Wooden
hoardings.

The erection of wooden hoardings, for the purpose of advertisement, fastened to the premises, is a breach of a covenant not "to erect or make any building or erection on any part of the demised premises." (*f*) But the erection of an advertisement hoarding is not a breach of a covenant that any "building" which should be erected on the land should be of a certain height, and have a stuccoed front and slated roof and be used only as a dwelling-house. (*g*)

Railway
embankment.

The construction of a railway embankment has been held to be a breach of a covenant not to erect any buildings on the land conveyed other than private dwelling-houses. (*h*)

"To keep
land open
and unbuilt
upon."

A covenant to keep land open and unbuilt upon is not broken by making an underground urinal. (*i*)

(*d*) *Att.-Gen. v. Briggs*, 1 Jur. N. S. 1084.

(*e*) *Lloyd v. L. C. & D. Ry. Co.*, 2 De G. J. & S. 568. See *Foster v. Birmingham, Wolverhampton, & Dudley Ry. Co.*, 2 W. R. 378. As to whether a wall is within such a covenant, see *Bowes v. Law*, L. R. 9 Eq. 636. As to a covenant "not to erect any building within the distance of six feet from a street," see *Child v. Douglas*, Kay, 560; the injunction in which case was subsequently dissolved by the Lords Justices chiefly on the ground of acquiescence, see mem. at p. 4 of Kay. In *Morish v. Harris*, L. R. 4 C. P. 155, it was doubted whether a space inclosed by four stone walls and roofed over, in which guano and other manures was kept, was a "building" or not.

(*f*) *Pocock v. Gilham*, 1 Cab. & El. 104; *Wood v. Cooper*, [1894] 3 Ch. 671.

(*g*) *Foster v. Fraser*, [1893] 3 Ch. 158. But see *Boyce v. Paddington Vestry* (1903), 1 Ch. 109, where it was held, in the circumstances of the case, that a hoarding was not a building, and (*per* Buckley, J., at p. 116 of the L. R.) "From these cases I derive no principle other than this, that a hoarding may or may not, according to the contract, be a building." And see *Wilson v. Queen's Club*, [1891] 3 Ch. 522.

(*h*) *Long Eaton Recreation Grounds Co. v. Midland Ry. Co.*, 50 W. R. 120.

(*i*) *Graham v. Newcastle*, 67 L. T. 790.

(12) BREACH OF COVENANT FOR QUIET ENJOYMENT BY BUILDINGS.

The defendant was owner of two adjoining pieces of land, on one of which he erected a house which he demised to the plaintiff. The lease contained a covenant for quiet enjoyment without any interruption or disturbance from or by the lessor, or any person lawfully or equitably claiming under him. The defendant then erected on the other piece of land buildings of such a height that they caused the chimneys of the plaintiff's house to smoke badly. It was held that the defendant had broken his covenant. (*k*) This decision was, however, doubted by two members of the Court of Appeal in a later case. (*l*)

"Quiet enjoyment" means without interference, without interruption of possession. It does not mean undisturbed by noise. (*m*)

Meaning of "quiet enjoyment."

(13) COVENANT NOT TO BUILD BEYOND BUILDING LINE.

Bay windows carried from the foundation up to the roof, and projecting three feet beyond the line of the existing houses, (*n*) are a breach of a covenant not to erect any "building" nearer to the road than the line of frontage of the then present houses in that road, and to observe a straight line of frontage with the line of houses; and an injunction was granted, the Court being of opinion that it was unnecessary to show damage, and that, in any case, the invasion of privacy constituted such damage. (*o*) Bay windows, however, are often expressly excepted. See form of covenant, *post*, p. 435.

Bay windows are "buildings" within such a covenant.

As to enforcement of covenants relating to the building line, see *Dewett v. Ramuz*. (*p*)

(*k*) *Tebb v. Cure* (1900), 1 Ch. 642.

(*l*) *Davis v. Town Properties Investment Corporation, Ltd.* (1903), 1 Ch. 795, in which it was held that, under the circumstances of the case, smoke from adjoining premises did not constitute a breach of a covenant for quiet enjoyment.

(*m*) *Per Kekewich, J.*, in *Jenkins v. Jackson*, 40 Ch. D. 71, at p. 74.

(*n*) As to the building line under the London Building Act, see *post*, pp. 489, 490.

(*o*) *Manners v. Johnson*, 1 C. D. 673. See *Coles v. Sims*, 5 De G. M. & G. 1. But see *Jackson v. Winiffrith*, 47 L. T. 243; *Chitty v. Bray*, 48 L. T. 890, *post*, p. 248. See also *Western v. MacDermott*, L. R. 1 Ex. 499; *ib.*, 2 Ch. 72; *Simpson v. Smith*, L. R. 6 C. P. 87, but this case was decided upon the special language of the Metropolitan Building Act, and was overruled on another point in *Sparkman v. Plumstead District Bd. of W.*, 10 A. C. 229. See *Tear v. Freebody*, 4 C. B. N. S. 228, 262; *Gaskin v. Balls*, 13 Ch. D. 324.

(*p*) *Appendix*, p. 659, *note*, *post*, p. 248.

(14) COVENANT NOT TO BUILD "OPPOSITE."

Meaning of
"opposite."

A covenant in the purchase deed of a house in a terrace, that no building shall be erected on any part of the land of the vendor lying on the other side of the terrace, *and opposite to the plot of land thereby conveyed*, applies only to that part of the land which is immediately opposite to, and is of the width of, the plot conveyed. (*q*)

(15) COVENANT AS TO PROSPECT.

Covenant
for unin-
terrupted
prospect.

The right to a *prospect* can be acquired only by grant or covenant, and not by prescription. Thus, where a motion was made to prevent the defendant from proceeding with certain buildings which would intercept the prospect from Gray's Inn Gardens, an injunction was refused before answer. (*r*) So, the Court will not restrain the erection of a building because it injures the plaintiff by obstructing his place of business from the view of passers-by. (*s*) But a person may acquire a right to have an uninterrupted prospect, where there is a covenant to that effect. (*t*)

(16) COVENANTS AS TO PLOTS FOR RESIDENTIAL PURPOSES.

(*a*) *Generally*.—Covenants are often inserted with a view to securing that building land shall be used for residential purposes. In order to ascertain the meaning of the word "residential," the object of the covenant must be looked to. Where the plaintiff purchased some plots of a building estate which was put up for sale, and was described in the particulars as "consisting of plots for the erection of private residences," and also as residential plots, there was a condition that "no building of any kind other than a detached or semi-detached house, with appropriate offices and out-buildings to be appurtenant thereto or occupied therewith." The defendants purchased certain of these plots and purposed to build thereon a home for poor people. In an action for an injunction it was held that the condition drew a distinction between "residential

(*q*) *Patching v. Dubbins*, 2 Eq. R. 71; *Jones v. Parry*, 57 L. T. 492.

(*r*) *Att.-Gen. v. Doughty*, 2 Ves. Sen. 453. See *Aldred's Case*, 9 Co. Rep. 58 b, and *post*, p. 317.

(*s*) *Bull v. Imperial Gas Co.*, L. R. 2 Ch. 158; *Smith v. Owen*, 35 L. J. Ch. 317. But see, however, *Riviere v. Bower*, Ry. & Moo. 24.

(*t*) See *Squire v. Campbell*, 1 My. & Cr. 459; *Piggott v. Stratton*, 1 De G. F. & J. 33; *Tulk v. Moxhay*, 2 Ph. 774; *Western v. MacDermott*, L. R. 1 Eq. 499.

plots" and "shop plots," but not between "residential plots" and "private residential plots," and that there was no breach. (u)

(b) *Mode of securing Performance of such Covenants.*—The benefit of restrictive building covenants is not so annexed to the whole of the land retained by the vendor as to pass, as a matter of course, by a conveyance of a part of such land to a subsequent purchaser, in the absence of any agreement or expression of intention to that effect. (v) On a sale of building plots, the conditions as to building, etc., may be either inserted in the conveyance to each purchaser, or embodied in a general deed of covenant, to be executed by all the purchasers. In order, therefore, to secure uniformity in building, when land is purchased by several persons in plots for building purposes, and it is intended that covenants of this nature shall be enforceable, not only by the vendor, but by all the purchasers, *inter se*, a deed of covenant should be entered into by the respective purchasers (w) and the vendor. A form of a deed of this description will be found with the other precedents. (x)

Mode of securing benefit of restrictive building covenants to all purchasers of building plots.

SECT. II.—COVENANTS AGAINST BUILDINGS FOR TRADES, BUSINESSES, OR SPECIFIED PURPOSES.

(1) GENERALLY.

If building land is to be laid out with private residences, a covenant is inserted to restrain the lessee from erecting any buildings on the premises to be used for carrying on trades or businesses; and, in framing such covenants, care must be taken to express accurately, whether the restraint is to extend to trades or businesses generally, or to particular trades or businesses. (y) The

(u) *Wright v. Berry*, 19 T. L. R. 259.

(v) *Kentes v. Lyon*, L. R. 4 Ch. 218; *Manners (Lord) v. Johnson*, 1 Ch. D. 673; and see Chap. XXI., *post*.

(w) See *Whatman v. Gibson*, 9 Sim. 196.

(x) See Form XXXIII., p. 449. See also *Coles v. Sims*, 5 De G. M. & G. 1; *Western v. McDermott*, L. R. 1 Eq. 499; 2 Ch. 72; *Eastwood v. Lever*, 33 L. J. Ch. 355; *Jay v. Richardson*, 30 B. & W. 563; *Jackson v. Winniffrith*, 47 L. T. 243. See *Muster v. Hanward*, 4 Ch. D. 718, and *post*, p. 232. As to a sale by the Court and restrictive covenants, see *Pollock v. Rabbits*, 21 Ch. D. 466. Where a purchaser of a plot (A) of building land had entered into a restrictive covenant with the vendors (mortgagors, their heirs and assigns, but not with their mortgagees; and, afterwards, the mortgagors conveyed another plot (B) of land near to plot (A) to another purchaser, who had no knowledge, when he purchased, of the existence of the above covenant. It was held that subsequent assignees of plot (B) could enforce the covenant against an assign of plot (A). The same principle applies to a building which is let out in flats. *Rogers v. Horegood* (1900), 2 Ch. 388.

Rights of assignees of plots.

(y) *Van v. Corpe*, 3 My. & K. 269; *Flight v. Booth*, 1 Bing. N. C. 370; S. C., 1 S. & W. 190. *In re Puckett and Smith's Contract* (1902), 2 Ch. 258.

real object in all these cases is to prevent the lowering of the tenement in the scale of houses, by the exercise, whether wholly or partially, of those trades which, in the judgment of the lessor, may depreciate their value at a future period. (z)

Are covenants against trades "usual covenants"? Covenants not to carry on a particular trade, or in restraint of trade in a trading locality, are not "usual covenants." (a) Whether they are so or not, however, is a question of fact. (b)

A covenant restrictive of the user of premises is not affected by the rule against perpetuities, (c) and is not void as being in restraint of trade; (d) such a covenant in a lease runs with the land. (e)

When covenant necessary by purchaser to vendor. Whenever the vendor sells property subject to certain liabilities, or restrictive covenants, for the observance of which he is personally liable, and it is a part of the arrangement that the purchaser shall take the land subject to the same restrictions, the purchaser must enter into a covenant with the vendor to abide by the same. (f)

(2) COVENANTS AFFECTING FLATS.

Residential flats, involving the use of a public entrance and staircase, do not answer the description of a messuage. "adapted for and used as and for a private residence only." (g)

"Houses" distinguished from "flats." It is possible to build "houses" as distinct from "flats," superimposed one upon the top of the other. (h)

Conversion of flats. The conversion of flats in a building into an hotel has been held to be a departure from the scheme in accordance with which the building was to be managed, namely, as residential flats suitable to the convenience of all persons who should be tenants of

(z) *Per* Lord Ellenborough, C.J., *Doe d. Gaskell v. Spry*, 1 B. & Ald. 619. Covenants of this description are not of modern growth, an instance being found in *Chinsley v. Langley*, 1 Roll. Abr. 427. See *Hislop v. Leckie*, 6 App. Cas. 560, as to the Scotch law with respect to restrictive covenants as to building.

(a) *Wilbraham v. Livesey*, 18 Beav. 206; *Proper v. Parker*, 3 My. & K. 280; *Van v. Corpe*, 3 My. & K. 269.

(b) *Bennett v. Womack*, 3 C. & P. 96.

(c) *L. & S.-W. Ry. Co. v. Gomm*, 20 Ch. D. 562; *Mackenzie v. Childers*, 43 Ch. D. 265.

(d) *Earl of Zetland v. Hislop*, 7 A. C. 427.

(e) *Congleton (Mayor) v. Pattison*, 10 East, 136; *Wilkinson v. Rogers*, 2 De G. J. & S. 62; *Fleetwood v. Hull*, 23 Q. B. D. 35. See *post*, Chap. XXI., as to covenants which run.

(f) *Moxhay v. Inderwick*, 1 De G. & S. 708.

(g) *Rogers v. Hosegood* (1900), 2 Ch. 388.

(h) *Ilford Park Estates, Ltd. v. Jacobs* (1903), 2 Ch. 522; and see also *Grant v. Langston* (1900), A. C. 383, 399.

the flats; (i) and in *Hudson v. Cripps* (j) an injunction was granted to restrain the conversion into a club of a large part of a building, adapted to occupation in residential flats, at the instance of a tenant who held under an agreement in a common form binding the tenants to rules suitable only for residential purposes.

(3) COVENANTS AGAINST SPECIFIED TRADES, ETC.

A covenant "not to build an hotel, tavern, etc.," on certain lots means that no hotel, tavern, etc., is to "be" upon any of those lots, it being impossible to tell whether or not a house when it is in the course of building is intended for an hotel, tavern, etc. The user of the house, however, must be looked to before declaring that the covenant is infringed. (k).

The lease of a building contained a covenant by the lessee not to paint or write any inscription, figure, or letter, nor affix, attach, or exhibit any sign-board or other notice of trade or business to the exterior walls without the lessor's consent. Part of the building consisted of a theatre, to the front wall of which was attached by iron brackets a metal frame, on which were the words "His Majesty's Theatre," surmounted by a crown. These words were illuminated at night. The consent of the lessor not having been obtained, this was held to be a breach of covenant, inasmuch as the notice amounted to a description of the business. (l)

(4) WHAT ALTERATION AMOUNTS TO BREACH OF COVENANT AGAINST TRADES.

It would appear that a covenant restraining the conversion of houses into shops may be broken by user, without any architectural or structural alterations of the house (m).

But the erection of a clock outside a jeweller's shop was held not to be a breach of covenant not "to make an alteration" to the demised premises." (n)

A contract for a lease, where the lessee is to build, and *not to use* the premises for any other purpose than a glass manufactory, *Not to use for any other purpose.*

(i) *Alexander v. Mansions Proprietary, Ltd.* (1900), 16 T. L. R. 431; and see also *Webb v. Faggotti*, 79 L. T. 683.

(j) (1896) 1 Ch. 265.

(k) *Webb v. Faggotti*, 79 L. T. 683.

(l) *Att.-Gen. v. The Playhouse, Ltd.*, 19 T. L. R. 580.

(m) *Wilkinson v. Rogers*, 2 De G. J. & S. 62. See *Evans v. Davis*, 10 Ch. D. 747, as to covenant not to permit outward show of business.

(n) *Bickmore v. Dummer* (1903), 1 Ch. 158.

does not entitle the lessor to the insertion of an affirmative covenant to carry on this business. (o)

(5) LESSOR'S LIABILITY TO ENFORCE TRADE COVENANTS.

At request of
one lessee
against
another.

A covenant by a lessor, not to let any house in the same street for a particular business, will not be so construed as to oblige him, at the request of the lessee, to enforce a covenant by another lessee of an adjoining house not to carry on such business without the consent of the lessor. (p) Of course, the case would be otherwise if the adjoining house were let with the intention of allowing the prohibited business to be carried on. (q)

SECT. III.—COVENANTS AGAINST OFFENSIVE TRADES AND NUISANCES.

(1) GENERAL COVENANT.

In some cases there is only a general covenant, which is so framed as to restrain the erection of houses or buildings for the exercise of offensive trades or businesses, or to prohibit occupations which may be a nuisance or annoyance to the other tenants of the lessor; and in construing such covenants, much will depend on the situation of the premises, and the particular circumstances of each case. (r).

"Offensive
trade."

A fried fish shop, for instance, has been held to be an offensive trade, having regard to the locality and the manner in which it was carried on, (s) although it may not be an offensive business within sect. 112 of the Public Health Act, 1875. (t)

(o) *Doe d. Marquis of Bute v. Guest*, 15 M. & W. 160.

(p) *Kemp v. Bird*, 5 Ch. D. 974, which was followed in *Ashby v. Wilson* (1900), 1 Ch. 66. See also *Holloway v. Hill* (1902), 2 Ch. 612; *Brigg v. Thornton* (1904), 1 Ch. 386.

(q) *Master v. Hansard*, 4 Ch. D. 723.

(r) *Gutteridge v. Munyard*, 7 C. & P. 129; per Tindal, C.J.

(s) *Devonshire (Duke) v. Brookshaw*, 81 L. T. 83.

(t) *Braintree L. Bd. v. Boyton*, 52 L. T. 99. As to the meaning of the words "nuisance," "annoyance," "grievance," etc., see *Jones v. Thorne*, 1 B. & C. 715; *Harrison v. Good*, L. R. 11 Eq. 338. As to the technical meaning of the word "nuisance," see the judgment of Sir William Erle in *Brand v. Hammersmith & City Ry. Co.*, L. R. 2 Q. B. at p. 246. See also *Doe d. Bish v. Keeling*, 1 M. & S. 95; *Doe d. Wetherell v. Bird*, 6 C. & P. 195; *Tod-Heatley v. Benham*, 40 Ch. D. 80; *Re Davis and Carey*, 40 Ch. D. 601; *Hickman v. Isaacs*, 4 L. T. N. S. 285; *Wiltshire v. Cosslett*, 5 T. L. R. 410; *Rapley v. Smart*, 38 S. J. 129; *Wood v. Cooper*, [1894] 3 Ch. 671; *Sanders Clark v. Grosvenor Mansions* (1900), 2 Ch. 373. As to bone-boiling, see *Cardiff Manure Co. v. Cardiff Union*, 54 J. P. 661. As to a small-pox hospital, see *English v. Tynemouth Corp.*, 67 J. P. 239.

The Courts will not interfere in the case of a trifling, fanciful, ^{Trifling annoyance.} or temporary annoyance. (u)

When there is a covenant against erecting premises to be used for a trade, it is not necessary to constitute a breach of the covenant that the act done should be a public or private nuisance. (v)

A covenant in a lease of a plot of land, part of a building estate, ^{Consent of owner.} not to build "without the consent in writing of D. [the owner of the estate], his heirs or assigns," means the consent of the owner of the estate in its broad and popular sense, and not of such owner and of all lessees and purchasers acquiring title after the date of the covenant. (x).

If the lessor permit the tenant to expend money on the premises ^{Landlord standing by.} in order to adapt them to a trade which is prohibited by the covenant, it would be evidence of his consent, and a licence would probably be implied; but the mere lapse of time alone, without such an implied assent, or some positive act by the lessor, is not a waiver of the forfeiture. (x)

(2) LIABILITY OF OWNER OR LESSOR FOR NUISANCES.

In framing covenants against nuisances and trades in building ^{Omission of apt words.} leases, it should be observed that the omission of the words "offensive trade, business, or occupation" may be of very great importance to the lessor, having regard to the liability of an owner or occupier of land, both at law and in equity, (y) in respect of nuisances committed, or caused, by those whom he brings on the land, where he licences the acts causing the nuisance.

The landlord may not be liable where a nuisance is caused by ^{Where act contemplated by the lease.} the act of a tenant, yet, if the act is one expressly contemplated

(u) *Everett v. Remington*, [1892] 3 Ch. 148.

(v) *Macher v. Fouldling Hospital*, 1 Ves. & B. 188.

(w) *Everett v. Remington* (1892), 3 Ch. 148.

(x) *Doe d. Sheppard v. Allen*, 3 Taunt. 78; *Doe d. Rosegreen v. Bliss*, 4 Taunt. 735. See *Gibson v. Doe*, 2 H. & N. 615, as to presumption of licence under seal after twenty years. This case was followed in *Hepworth v. Pickles* (1900), 1 Ch. 108; and *Gibson v. Payne*, 22 T. L. R. 51, where a covenant to build not having been enforced for a long period was held to be released. See *Doe d. Ambler v. Woolbridge*, 9 B. & C. 376, as to covenants against trades being of a continuing nature; *Sayers v. Collyer*, 28 Ch. D. 103; *Wiltshire v. Chaslett*, 5 T. L. R. 410. See also *Willmott v. Barber*, 15 Ch. D. 96; *Fullwood v. Fullwood*, 9 Ch. D. 176; *L. C. & D. Ry. Co. v. Bull*, 47 L. T. 413; *Northumberland (Duke) v. Bowman*, 56 L. T. 773; *Bridges v. Longman*, 24 Beav. 27.

(y) *White v. Jameson*, L. R. 18 Eq. 303; *Jenkins v. Jackson* (1887), 40 Ch. D. 71; and at p. 227, ante.

in, and authorised by, the lease, the landlord may be liable for any injury caused thereby, (z) although the tenant, if sued, might have no defence to the action. (a)

SECT. IV.—PROVISIONS TO SECURE PERFORMANCE OF RESTRICTIVE COVENANTS.

(1) PENAL RENTS.

Penal rents upon failure to build according to covenant.

The various methods of enforcing performance or restraining breaches of restrictive building covenants are dealt with at length in Chap. XX., *post* p. 242. It will be convenient, however, to deal with certain specific remedies for which provision is often made in building leases. Thus it is not unusual to find increased (or what are sometimes termed penal) rents made payable for a departure from a prescribed course of building, or for other breaches of restrictive covenants. In these cases the sum reserved is regarded not as a penalty, (b) but as the amount fixed by the parties as a satisfaction for a breach; (c) and the right to the additional rent, *nomine pence*, is not waived by the acceptance, with a knowledge of the breach, of the principal rent reserved, up to and inclusive of a period covering the time of such alleged breach. (d)

So, where an increased rent was reserved by way of liquidated damages, the same construction prevailed in equity. (e) An injunction was not granted to restrain the lessee from committing the breach of covenant, in respect of which the increased rent became payable. (f)

Proviso for re-entry not affected by penal rent.

But where a penal rent is reserved by a lease, in case any trades shall be carried on, and there is a proviso for re-entry, if there should be a breach of any of the covenants on the part of

(z) *Harris v. James*, 45 L. J. Q. B. 545.

(a) *White v. Jameson*, L. R. 18 Eq. 303, *supra*.

(b) But see *Burne v. Madden*, Lloyd & Goo. temp. Plunket, C., 493. As to a building lease not being chargeable with duty in respect of penal rent, see Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 77.

(c) See *ante*, Chap. XI., Sect. II., p. 142, as to the difference between a penalty and liquidated damages in building contracts.

(d) *Denton v. Richmond*, 1 C. & M. 734.

(e) *Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 6 Bro. P. C. 436; *Aylet v. Dodd*, 2 Atk. 238, 239; *Benson v. Gibson*, 3 Atk. 395, 396; *Lowe v. Peers*, 4 Burr. 2225, 2228; *Birch v. Stephenson*, 3 Taunt. 469, 473, 474; *Denton v. Richmond*, 1 C. & M. 734.

(f) *Woodward v. Gyles*, *supra*; *Forbes v. Curney*, Wallis, by Lyne, 38.

the lessee, such lessee is not entitled to carry on a trade within the restrictive covenant upon payment of the penal rent, for the lessor has two remedies: if the increased rent is received, with knowledge of the forfeiture, any existing cause of forfeiture is waived, but if the forfeiture is insisted on, the lessor is entitled to re-enter under the condition for re-entry. (g)

(2) PROVISO FOR RE-ENTRY.

If a covenant, restricting the description of buildings to be erected upon the land, is not enforceable by a proviso for re-entry in the lease, the breach of it will not support an ejectment, but only an action for damages, or claim for an injunction. (h)

Provisions
necessary
to secure
performance.

Provisoes for re-entry in leases are conditions annexed to the term, and are to be construed, like other contracts, according to the intent of the parties, to be collected from the words used, and not with the strictness of conditions at common law; therefore the lessor, and not the lessee, has the option of determining a building lease upon a breach made within the proviso. (i) A proviso, in an agreement of demise, that the tenant should within a certain time build a house, and that, if he did not do so, the landlord might retake possession of the premises, and the agreement should be null and void, makes it voidable only at the election of the lessor. (k)

Construction
of proviso.

The word "perform" as used in a proviso for re-entry may refer to "negative" as well as "positive" covenants. (l)

Meaning of
word "per-
form."

(3) RESTRICTION ON RIGHT OF RE-ENTRY UNDER THE CONVEYANCING ACTS.

The Conveyancing and Law of Property Act, 1881, s. 14 (1) provides (m) that notice must be given in order to enforce the right of re-entry.

(g) *Weston v. Metropolitan Asylum District Managers*, 9 Q. B. D. 404; *Coles v. Sims*, 5 De G. M. & G. 1; *Barret v. Blagrove*, 5 Ves. 555; *Jones v. Heavens*, 4 Ch. D. 636; and see Chap. XI., Sect. II., *ante*, p. 142.

(h) *Cole, Eject.* 432; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; *Cutt v. Tourle*, L. R. 4 Ch. Ap. 654.

(i) *Doe d. Davis v. Elsom*, Moo. & M. 189.

(k) *Doe d. Nash v. Birch*, 1 M. & W. 402. See notes to *Dumfries's Case*, 1 Sm. L. C.; *Roberts v. Davey*, 4 B. & Ad. 644; *Davenport v. The Queen*, L. R. 3 App. Cas. 115; *Hayne v. Cummings*, 16 C. B. N. S. 421. See *Hunt v. Remnant*, 9 Exch. 635, as to right of re-entry for condition broken being capable of passing by assignment. See *Hunt v. Bishop*, 8 Exch. 675, where the words "to re-enter" were omitted in the proviso.

(l) *Harman v. Ainslie* (1904), 1 K. B. 698.

(m) "A right of re-entry or forfeiture under any proviso or stipulation in a

The notice must be in writing, and a notice addressed to the original lessee and all others whom it may concern, and served on the person in occupation, is sufficiently addressed and served. (*n*)

The right of the lessor to re-enter is postponed until the notice has been served. (*o*) The notice may be good though it does not require payment of compensation in money. (*p*)

Costs, etc.,
may be
recovered.

The lessor is entitled to recover as a debt due to him from the lessee, and, in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provision of the Conveyancing Acts, 1881 or 1892. (*q*) Such moneys cannot be recovered by a lessor from an under-lessee. (*r*) A lessee who, by complying with a notice given under sect. 14, sub-sect. 1, of the Act of 1881, prevents a right of forfeiture from becoming enforceable is not "relieved" within the meaning of sect. 2 of the Conveyancing Act of 1892. (*s*)

Scope of s. 14. Sect. 14 does not extend to a covenant or condition against the assigning, (*t*) under-letting, parting with the possession, or

lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

(*n*) As to mode of service, etc., see s. 67. See *Mitchison v. Thomson*, 1 Cab. & El. 72; *Cronin v. Rogers*, 1 Cab. & El. 348.

(*o*) *Creswell v. Davidson*, 56 L. T. 811.

(*p*) *Lock v. Pearce*, [1893] 2 Ch. 271; *Skinner v. Knight* (1891), 2 Q. B. 542. The object of the section is well explained in *Horsey Estate v. Steiger* (1899), 2 Q. B. 79, per Russell, L.C.J., at p. 91. See also *In re Serle* (1898), 1 Ch. 652; *Fletcher v. Nokes* (1897), 1 Ch. 271; *Jacob v. Down* (1900), 2 Ch. 156; *Pannell v. City of London Brewery* (1900), 1 Ch. 496.

(*q*) Conveyancing Act, 1892, 55 & 56 Vict. c. 13, s. 2, reversing *Skinner v. Knight* (1891), 2 Q. B. 542.

(*r*) *Nind v. Nineteenth Century Building Society*, [1894] 2 Q. B. 226.

(*s*) *Ib.* As to lessee's right of relief, see Conveyancing Act, 1881, s. 14 (2). As to the rights of an under-lessee, see Conveyancing Act, 1892, s. 4, and *Imray v. Oakshette* (1891), 2 Q. B. 218; *Quilter v. Mapleson*, 9 Q. B. D. 672; *Lock v. Pearce* (1893), 2 Ch. 271. As to the rights of a sub-lessee, see *Cholmeley School v. Sewell* (1894), 2 Q. B. 906.

(*t*) The lessee's being adjudicated bankrupt on his own petition does not operate as a breach of his covenant not to assign, *Riggs, In re, Lovell, Ex parte*, (1901), 2 K. B. 16.

disposing of the land leased; (u) and is not to affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. (w) It applies to leases made either before or after the commencement of this Act, and has effect notwithstanding any stipulation to the contrary. (v)

(4) PERFORMANCE OF NEGATIVE COVENANTS.

Although it was at one time thought that a proviso for re-entry on failure in "performance" of any covenant did not apply to a negative covenant, (y) this is no longer law.

In a proviso for re-entry for non-performance of covenants, the word "perform" is used as meaning the fulfilment of the obligation or duty undertaken, and not as referring to the thing to be done or left undone in pursuance of the covenant; accordingly a negative covenant is "performed" by a man not doing the thing which he has promised not to do, equally as an affirmative covenant is "performed" by his doing what he has promised to do. (z).

A proviso for re-entry on "breach of any of the covenants" includes negative covenants; (a) so, too, does a proviso "if the lessee make default of or in performance of all or any of the covenants, etc., which on his part are, or ought to be, observed, performed, or kept." (b)

SECT. V.—COVENANTS AS TO COMMON GARDENS OR GROUNDS. (c)

Where land, as is frequently now the case, is laid out for building, with a pleasure garden so enclosed as to be used in common by all the tenants of the houses, the lessee of each plot should covenant to concur with all the other lessees of the land fronting the garden in inclosing, in a specified manner, and forming the garden, and also to contribute such a proportion of the expense as the frontage of the parcel of ground demised bears to the whole

(u) Act of 1881, s. 14, sub-s. 6.

(w) Sub-s. 8. See Common Law Procedure Act, 1860 (23 & 24, Vict. c. 126), s. 1, and *Croft v. London & County Banking Co.*, 14 Q. B. D. 317.

(x) Sub-s. 9. See *Quilter v. Mapleson*, 9 Q. B. D. 762.

(y) *West v. Dobb*, L. R. 5 Q. B. 460; *Hyde v. Warden*, 3 Ex. D. 72.

(z) *Harman v. Ainslie* (1904), 1 K. B. 698, *per Collins*, M.R., at p. 700 in the L. R.

(a) *Wadham v. Postmaster-General*, L. R. 6 Q. B. 644.

(b) *Croft v. Lumley*, 6 H. L. C. 672; *Timms v. Baker*, 49 L. T. 106.

(c) See F. XXXIII., *post*, p. 449.

Garden to be used in common by the lessees of building plots.

of the frontages; and to concur in appointing a committee to manage the garden, and to pay the rate assessed for keeping it in repair, or to permit the lessor to pay such rates if default is made, and to repay the same; and, lastly, to abide by the rules from time to time made by the committee with respect to the garden. (c)

SECT. VI.—COVENANTS TO REPAIR IN BUILDING LEASES. (d)

Whether covenant extends to buildings not erected at date of lease.

What an express covenant will include.

Limitation of repairing covenant.

Liability of assignee.

Buildings erected by the lessee during the term, as well as buildings forming the subject of the lease, seem to be within the scope of a general covenant to repair. (e) *A fortiori*, if the covenant is to repair "buildings erected or to be erected." (f)

If the covenant to repair extends in terms to buildings to be thereafter erected on the premises, it will, in this case, comprehend buildings let into and fixed in the soil and freehold; (g) but buildings resting upon blocks or pattens, being mere chattels, are not comprised in such a covenant. (h)

A covenant to repair and keep in repair will not impose upon a lessee the obligation of restoring premises to their original condition, if he has been compelled during the term to alter them to meet the requirements of the London County Council under the London Building Act, 1894. (i)

It is no defence to an action against an assignee for damages for breach of covenant to repair that the premises were out of repair at the date of the assignment. (k)

(c) See form in *Davidson*, vol. v. pt. 1 (3rd ed.), 150.

(d) As to covenant by lessor to repair, and necessity for notice of want of repair, see *Torrens v. Walker* (1906), 2 Ch. 166.

(e) *Darcey v. Askwith*, Hob. 234; 1 Esp. N. P. 277; *Brown v. Blunden*, Skin. 121; *Douse v. Earle*, 3 Lev. 264; *Douse v. Cale*, 2 Vent. 126; Bac. Abr. Covenant (F.). See also *Douse v. Earle*, according to Levinz, 3 Lev. 264; but Ventris, who also reported the same case (*nom. Douse v. Cale*, 2 Vent. 126), makes no mention of this general proposition. See *Nouaille v. Flight*, 7 Beav. 521; *Doe d. The Trustees of the Schools, etc., of Worcester v. Rowlands*, 9 C. & P. 734; *Cornish v. Cleife*, 3 H. & C. 446; *In re Newbery*, *White v. Wakley*, 26 Beav. 17.

(f) *Hudson v. Williams*, 39 L. T. 632.

(g) See *Perry v. Brown*, 2 Stark. 403, as to a verandah; *West v. Blakeway*, 3 Scott, N. R. 199, 218, as to a greenhouse. If erections are built, and used for the purposes of trade, the covenant does not in certain instances extend to them. See *Naylor v. Collinge*, 1 Taunt. 19; *Thresher v. East London Waterworks Co.*, 2 B. & C. 608; *Dean v. Allalley*, 3 Esp. 11.

(h) *Ib.*; *Davis v. Jones*, 2 B. & Ald. 165.

(i) *Wright v. Lawson*, 19 T. L. R. 203, following *Lister v. Lane* (1893), 2 Q. B. 212.

(k) *Plummer v. Johnson*, 18 T. L. R. 316.

(1) DAMAGES FOR BREACH OF COVENANT TO REPAIR.

The measure of damages for breach of the covenant to repair during the currency of the term is the loss which has ensued to the lessor's reversion, *(l)* a loss which will be greater or less according as the term has a greater or less time to run. *(m)*

Measure of damages.

Where the term has come to an end, and the action is consequently on the covenant to leave in repair, the measure of damages is the sum which it would take to put the premises into the state of repair in which the lessee ought to have left them according to the terms of his covenant. *(n)* Where an action was brought to recover damages for breach of covenant to leave in repair at the end of the term, and it appeared that some years before the plaintiff had brought an action for breach of covenant to keep in repair in which he recovered the sum of £1305 as damages, it was held that the true measure of damages in the second action was the cost of putting the premises into the state of repair in which the tenant was bound to leave them at the expiration of the term, less the sum of £1305, *(o)* with interest at 4 per cent.

Where term has come to an end.

Where a lease contains covenants to keep the demised premises in repair and to deliver them up in good repair, and a sub-lease is granted containing similar covenants with notice to the sub-lessee of the original lease, and the lessee brings an action against the sub-lessee for breach of his covenant to keep in repair, it is right, in assessing the damages, to take into account the liability of the lessee upon the covenants in the original lease. *(p)*

Liability of sub-lessee.

(2) WHERE THERE IS A COVENANT TO PULL DOWN AND REBUILD.

Where old buildings on the demised premises are to be pulled down and new ones erected, the covenant to repair, and deliver up in repair, should be carefully framed, so as to comprise all the houses to be newly erected, which, in some instances, may exceed the number of the old buildings. *(q)*

(l) *Doe v. Rowlands*, 9 C. & P. 734.

(m) *Doe v. Rowlands*, *supra*, per Coleridge, J.; *Turner v. Lamb* (1845), 14 M. & W. 412; *Fox on Landlord and Tenant*, 3rd ed., p. 207.

(n) *Morgan v. Hardy*, 17 Q. B. D. 770; *Jeyner v. Weeks* (1891), 2 Q. B. 31.

(o) *Ebbetts v. Conquest* (No. 2), 82 L. T. 590.

(p) *Conquest v. Ebbetts* (No. 1), (1896), A. C. 430.

(q) As to the requirements of such covenants, see *Douse v. Calé*, 2 Vent. 126. Rokeby thought that the two parts of the sentence constituted but one covenant,

SECT. VII.—COVENANTS IN BUILDING UNDER-LEASES. (r)

Express
covenant by
under-lessee.

The building sub-lease should contain an express covenant by the sub-lessee to perform all the covenants in the original building lease, except such of them as the lessee himself is to continue to perform; and it is not advisable that the covenants in the original lease should be repeated *verbatim*, since the legal effect of the two sets of covenants will be different, owing to the different dates at which the two tenancies commenced. (s) As to the effect of an agreement for a sub-lease to contain such covenants, clauses, and provisoes as were contained in the head lease, see the case of *Haywood v. Silber*, (t) which is stated in Chap. VI., *ante*, p. 54.

Relation
between
original
lessor and
sub-lessee.

As no privity exists between the under-lessee and the original lessor, the covenants entered into between the latter and the original lessee, though they be covenants which run with the land, cannot affect, either by way of right or liability, the under-lessee personally; (u) but the original lessor may distrain for rent, or evict the sub-lessee, if the rent be in arrear or a forfeiture be incurred; (v) and he may obtain an injunction to restrain a breach by the sub-lessee of a covenant in the original lease. (x)

SECT. VIII.—CLAUSES AS TO GIVING UP LAND FOR BUILDING.

If it is not intended that the land demised should be immediately used for building, it is not unusual to find a stipulation in the lease that the lessee should give up possession of part of the land in case the lessor should at any time require the same for building. (y) A clause in an agreement to let land for a term of years, that the

2 Vent. 128. See *Nouaille v. Flight*, 7 Beav. 521. As to a lessor not losing his remedy on a covenant to deliver up, by making structural alterations after determination of lease, see *Inderwick v. Leech*, 1 Cab. & El. 412. See also *Lant v. Norris*, 1 Burr. 287. See *Thresher v. East London Waterworks Co.*, 2 B. & C. 608; *Foley v. Addenbrooke*, 13 M. & W. 174. As to continuing breach of a repairing covenant, see *Jacob v. Down* (1900), 2 Ch. 156.

(r) See F. XXXI., p. 443.

(s) See *per* Pollock, B., in *Pontifex v. Foord*, 12 Q. B. D. 152, 156; and see *Logan v. Hall*, 4 C. B. 598; *Payne v. Haine*, 16 M. & W. 541; *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hation*, 10 M. & W. 249, 258; *Doughty v. Bowman* (in error), 11 Q. B. 454; *Piggott v. Stratton*, 29 L. J. Ch. 1, 7.

(t) 30 Ch. D. 404.

(u) *Holford v. Hatch*, 1 Doug. 183; *Doe d. Wyatt v. Byron*, 1 C. B. 623, 626.

(v) *Arnsby v. Woodward*, 6 B. & C. 519. As to re-entry, see s. 14 of the Conveyancing Act, 1881, *ante*, p. 235, which includes an under-lease.

(x) See *Parker v. Whyte*, 1 H. & M. 167; and see *post*, p. 244.

(y) See a form of a proviso, 5 Davidson (3rd ed.), 242.

lessor might take any part for building, on making a proportionate abatement in the rent, operates as a covenant, and not a defeasance of the estate, in the absence of words giving him a right of re-entry. (z)

The lessee will be protected against dispossession, unless the land is *bonâ fide* wanted for the purpose of building. (a)

(z) *Doe d. Wilson v. Philips*, 2 Bing. 13. But see *Doe d. Wilson v. Abel*, 2 M. & S. 541; *Doe d. Gardner v. Kennard*, 12 Q. B. 244.

(a) *Russell v. Coggins*, 8 Ves. 34.

CHAPTER XX.

ENFORCING PERFORMANCE OR RESTRAINING BREACHES OF RESTRICTIVE BUILDING COVENANTS.

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THE subject-matter of this chapter may be conveniently dealt with under the following heads: Section I., General principles upon which the Court will grant relief; Section II., Mandatory injunctions; Section III., Effect of delay, acquiescence, or participation.

SECT. I.—GENERAL PRINCIPLES ON WHICH THE COURT WILL GRANT RELIEF.

General rule as to when the Court will give relief.

Two remedies are open to the lessor for breaches of building covenants, in addition to his right of re-entry, which is dealt with in the preceding chapter; (*a*) namely, proceedings for specific performance, or an action for damages. Although the Court will not, in general, decree specific performance of covenants to build, (*b*) yet, where the covenant is of a restrictive nature, that is to say, where a person has entered into a covenant not to build upon certain land, specific performance takes the form of an injunction, or order restraining the party from doing the act. But the Court, in accordance with the general principles applying to specific performance, will require a complete performance by the other party as a condition of granting, and continuing the injunction. (*c*) If

(*a*) See Chap. XIX., Sect. IV. (2), *ante*, p. 235, *et seq.*

(*b*) *Ante*, Chap. XVI.

(*c*) *Peto v. Brighton & Uckfield Ry.*, 1 H. & M. 468; *Stocker v. Wedderburn*,

the covenant is in terms negative and the construction of the instrument be clear, and the breach clear, then it is not a question of damage, but the party is entitled to his injunction. (*d*) The Court will give this relief whether the negative stipulation be contained in express terms, or whether it be implied from affirmative expressions. (*e*) A covenant, therefore, not to build upon land will be enforced, and an injunction will be granted against the continuance of buildings erected contrary to the covenant. (*f*)

Where covenant is negative.

Where, however, on the sale of the whole of a vendor's land the purchaser enters into a covenant restricting the user of the land, the executors of the vendor cannot maintain an action for an injunction against an assign of the purchaser in respect of a breach of the covenant committed after the vendor's death. Such a covenant is merely personal and collateral, and the principle of *Tulk v. Moxhay* (*g*) does not apply to it. (*h*)

Action by vendor's executor.

When a person seeks the aid of the Court to restrain the breach of a covenant, he must show that his own dealings in the matter have been fair and consistent with equity; as, upon an application for an injunction, his general conduct in respect of the transaction in question will be taken into consideration. (*i*)

Plaintiff's conduct to be considered.

Where the purchaser of a plot forming part of a building estate exceeds the building line, and the vendor, who builds on the adjacent plot, exceeds the line to the same extent, the vendor cannot sue the purchaser for breach of covenant. But in a case where the purchaser's successor in title proposed to exceed the line to a greater extent, he was restrained by injunction. (*k*)

Covenant as to building line.

The Court may interfere to prevent a threatened breach if the

Threatened breach.

3 K. & J. 405. See *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; and *L. & S.-W. Ry. Co. v. Gomm*, 20 Ch. D. 562; *post*, p. 257.

d *Doherty v. Allmann*, 3 A. C. 702, approved in *McEachern v. Colton* (1902), A. C. 104; *Tipping v. Eckerley*, 2 K. & J. 270; *Lord Manners v. Johnson*, 1 Ch. D. 673.

e *Per* Lord Selborne, L.C., in *Wolverhampton Ry. Co. v. L. & N.-W. Ry. Co.*, L. R. 16 Eq. 440; *Cutt v. Tourle*, L. R. 4 Ch. 654. See *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; and *L. & S.-W. Ry. Co. v. Gomm*, 20 Ch. D. 562.

f *Rankin v. Hiskisson*, 4 Sim. 13; *Tulk v. Moxhay*, 13 Jur. 89; *Smith v. Smith*, L. R. 20 Eq. 500; *Western v. McDermott*, L. R. 2 Ch. 72; *Leech v. Schweder*, L. R. 9 Ch. 463; *Lord Manners v. Johnson*, 1 Ch. D. 673, *supra*. See *Tear v. Freebody*, 4 C. B. N. S. 228, 262; *Simpson v. Smith*, L. R. 6 C. P. 87.

g 13 Jur. 89, *supra*.

h *Formby v. Barker* (1903), 2 Ch. 532.

i *Harret v. Blagrave*, 6 Ves. 105; *Buteaman v. Ramsay*, Sau. & Sc. 459; *Gibson v. Goldamid*, 5 De G. M. & G. 757, 765. See *Stoff v. Cassell*, 2 Jur. N. S. 348; *Maythorne v. Palmer*, 11 Jur. N. S. 230; *Lloyd v. L. C. & D. Ry. Co.*, 2 De G. J. & S. 568; *Dutton v. Furniss*, 35 L. J. Ch. 461.

k *Dowsett v. Ramuz*, Appendix, p. 652.

defendant claims and insists upon a right to break his covenant, (*l*) and may grant an anticipatory injunction; (*m*) but a person who has covenanted not to use a building for certain purposes (*e.g.* a circus) will not be restrained from erecting a building which can apparently only be used for such purposes. (*n*)

SECT. II.—MANDATORY INJUNCTIONS.

(1) WHEN GRANTED.

Severance of
affirmative
and negative
parts of
covenant.

In adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the Court will in a proper case enforce the negative portion of the covenant. (*o*)

By means of a "mandatory injunction" the Court will, in some cases, enforce indirectly the affirmative terms of a contract relating to building, of which it could not directly decree the specific performance. (*p*)

In *Lane v. Newdigate* (*q*) (which is one of the first instances in which an order for a "mandatory injunction" was made in the case of a breach of covenant) Lord Eldon, although he refused to make an order on the defendant specifically to repair the banks of a canal and stop-gate, nevertheless restrained the defendant from impeding the plaintiff from navigating, using, and enjoying the canal, by continuing to keep the canal, banks, or works out of

(*l*) *Tipping v. Eckersley*, 2 K. & J. 270, *supra*.

(*m*) *Wilkinson v. Rogers*, 12 W. R. 284.

(*n*) *Worsley v. Swann*, 51 L. J. Ch. 576. As to relief where particulars of sale were misleading, see *Bascomb v. Beckwith*, L. R. 8 Eq. 100; and see Chap. VI., Sect. II. (3), *ante*, p. 65.

(*o*) *Clegg v. Hands*, 44 Ch. D. 503; but see *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; *Davis v. Foreman*, [1894] 3 Ch. 654; *Rankin v. Huskisson*, 4 Sim. 13; *Lord Mannors v. Johnson*, 1 Ch. D. 673.

(*p*) *Doherty v. Allman*, 3 A. C. 709. See Chap. XVI.; and see *per* Jessel, M.R., in *Smith v. Smith*, L. R. 20 Eq. 500; *per* Lord Westbury, L.C., in *Isenberg v. East India House Co.*, 3 De G. J. & S. 272. See now s. 25 (8) of Judicature Act, 1873, and Or. L. r. 6 of the Rules of the Supreme Court; and see *per* Brett, L.J., in *Glossop v. Heston L. Bd.*, 12 Ch. D. at p. 123, as to when granted.

(*q*) 10 Ves. 192. See also *Allport v. Security Co.*, 11 T. L. R. 310; *Philipps v. Treeby*, 8 Jur. N. S. 999; *Seawell v. Webster*, 7 W. R. 691; *Snow v. Whitehead*, 51 L. T. 253; *Callender v. Hawkins*, 2 C. P. D. 592; but see *Kilbey v. Haviland*, 19 W. R. 698; *Strelley v. Pearson*, 15 Ch. D. 113; *Foster v. Birmingham, Wolverhampton, etc., Ry. Co.*, 2 W. R. 378; *Newmarch v. Brandling*, 3 Sw. 99. See *Raphael v. Thames Valley Ry. Co.*, L. R. 2 Ch. Ap. 147.

repair, and by diverting the water, or continuing the removal of a stop-gate.

Where the defendant, with knowledge that a writ had been issued against him, evaded service and proceeded with his building operations, the Court granted an interlocutory mandatory injunction to pull down so much of the building as had been erected between the dates of issue and service of the writ. (*r*)

"Running up" a building.

There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action; but the Court will only grant such an injunction to prevent extreme or very serious damage. (*s*)

Injury complete before action.

In a fit case, the Court will grant a mandatory injunction on an interlocutory application. (*t*)

Interlocutory mandatory injunction.

Without any undertaking given on an interlocutory application, the Court has jurisdiction at the trial to order the pulling down of any buildings erected after the commencement of the action, or after notice given to the defendant that the plaintiff objected to the building. (*u*)

Buildings erected after action, or notice.

Liberty will not be given to a plaintiff in an action for a mandatory injunction, in aid of specific performance of a building agreement, to apply to the Court, in the event of the defendant erecting any wall or building which should prevent free access of light and air. (*w*)

Liberty to apply not given.

(2) WHEN NOT GRANTED.

But the Court will not grant a mandatory injunction where it would cause serious inconvenience to the district; (*x*) or where damages would be an adequate remedy. (*y*) Nor will the Court restrain the breach of an affirmative covenant if, by so doing, the damage to the defendant would be very much greater than any

(*r*) *Van Joel v. Hornsey* (1895), 2 Ch. 774.

(*s*) *Durell v. Pritchard*, L. R. 1 Ch. 241. See *Carriers' Company v. Corbett*, 11 Jur. N. S. 749; *Martin v. Headon*, L. R. 2 Eq. 425; *Martyr v. Lawrence*, 2 De G. J. & S. 261; *Lady Stanley of Alderley v. Shrewsbury*, L. R. 19 Eq. 616; *Hackett v. Baiss*, L. R. 20 Eq. 494. See *Baxter v. Bower*, 23 W. R. 805; *Gaskin v. Balls*, 13 Ch. D. 324; and *post*, Chap. XXIII.

(*t*) *Bonner v. G. W. Ry.*, 24 Ch. D. 1.

(*u*) *Smith v. Day*, 13 Ch. D. 651; *Daniel v. Ferguson* (1891), 2 Ch. 27.

(*w*) *Per Lord Westbury, C.*, in *Low v. Innes*, 4 De G. J. & S. 297. See *Lloyd v. Dimmack*, 7 Ch. D. 398.

(*x*) *Att.-Gen. v. Acton L. Rd.*, 22 Ch. D. 224.

(*y*) *Colls v. Hare and Cleveland Stores* (1901), A. C. 179.

possible advantage to the plaintiff, or if the injury is not one which, when done, cannot be remedied or compensated for by the payment of damages. (z)

SECT. III.—DELAY, ACQUIESCENCE, PARTICIPATION.

(1) GENERALLY.

Delay, or acquiescence, may disentitle a party to relief by way of either an injunction or damages. (a) The real question in each case is, whether the particular circumstances prove, to the satisfaction of the Court, that there has been such an amount of acquiescence on the part of the plaintiff as disentitles him to relief.

(2) WHEN DELAY OR ACQUIESCENCE IS SUFFICIENT TO DISENTITLE PLAINTIFF TO RELIEF.

Where a conveyance in fee had been made of certain lands in the city of London, and the feoffee covenanted not to use the land in a particular manner, with a view to the more ample enjoyment of the adjoining lands by the feoffor; and afterwards, by the voluntary acts of the feoffor, and those claiming under him, the character and condition of the adjoining lands had been so greatly altered that the contemplated benefits were entirely gone; the Court refused to interfere to compel specific performance by injunction, and left the party to his remedy at law on the covenant. (b)

Relief, however, will not be refused merely because, in a few instances, the covenants have not been enforced. (c)

And where the landlord had waived a covenant, intended for the general benefit of the property, with some of the tenants, the Court declined to restrain a similar infringement by other tenants. (d) And where the vendor permitted, without interference,

(z) *Doherty v. Allmann*, 3 A. C. 709.

(a) *Stocker v. Wedderburn*, 3 K. & J. 393, 405; *Powell v. Allarton*, 4 L. J. Ch. N. S. 91; *Kelsey v. Dodd*, 52 L. J. Ch. 34. *Semble*, the plaintiff could not maintain an action, even for nominal damages only, on the covenant at law. *Ib.*

(b) *Duke of Bedford v. Trustees of British Museum*, 2 M. & K. 552; *Meredith v. Wilson*, 69 L. T. 336; comp. *Kemp v. Sober*, 1 Sim. N. S. 517; *Johnstone v. Hall*, 2 K. & J. 414; *Western v. McDermott*, L. R. 1 Eq. 499; L. R. 2 Ch. 72. But see *Kelsey v. Dodd*, 52 L. J. Ch. 34; *Sayers v. Collyer*, 28 Ch. D. 103; and see *Wiltshire v. Cosslett*, 5 T. L. R. 410.

(c) *Knight v. Simmonds* (1896), 2 Ch. 294.

(d) *Roper v. Williams*, Turn. & R. 18; *Child v. Douglas*, 5 De G. M. & G.

material breaches of covenants, entered into by purchasers of lots of the estate with the vendor, and also, *inter se*, by some of the purchasers, he could not enforce them against a purchaser who bought *after* the breaches had been committed. (e)

But the principle of *The Duke of Bedford v. Trustees of British Museum* (f) does not apply where an alteration in the character of the adjoining property has not taken place, either through the acts or permission of the plaintiff in person, or those under whom he claims, and where the change which has taken place was beyond the control, and independent of the action, of the plaintiff. (g)

Effect of change in the character of character of neighbouring property.

It was decided in *Osborne v. Bradley* (h) that alteration in the character of a neighbourhood is no defence to an action on a covenant restricting user unless it is proved, by the existence of a building scheme or otherwise, that the covenant was entered into with the object either (a) of securing the common advantage of a number of purchasers, or (b) of protecting other property of the covenantee, and that the covenantee has by his own acts or acquiescence made it impossible to attain that object. (i)

A distinction must be drawn, where the covenant is only for the benefit of *each* tenant, and not for the benefit of all the other tenants, though entered into by the lessor with all his tenants, (k) or if it is left to the lessor himself to determine what tenant shall be relieved from the obligations of the covenant. (l)

Where lessor's covenant is not for general benefit.

The fact that the plaintiff did not interfere to prevent a small and limited breach of a restrictive covenant in a building lease, does not conclude him for all time in respect of a wider and more important breach. (m)

Acquiescence in former, or limited and immaterial, breaches.

If there is a substantial breach of the covenant, acquiescence, of even participation, in trivial breaches will not, alone, deprive

739; *Sayers v. Collyer*, 28 Ch. D. 103. See *Schreiber v. Creed*, 10 Sim. 9; *Whitman v. Gibson*, 9 Sim. 196; comp. *Eastwood v. Lever*, 33 L. J. Ch. 355, where it was held that a plaintiff, though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages under Lord Cairns' Act. *Mitchell v. Stewart*, L. R. 1 Eq. 541; *Western v. McDermott*, *supra*.

(e) *Peck v. Matthews*, L. R. 3 Eq. 515.

(f) 2 M. & K. 552.

(g) See *Sayers v. Collyer*, 28 Ch. D. 103; *Craig v. Greer* (1899), 1 Ir. R. 258.

(h) (1903) 2 Ch. 446, *supra*. The law is well summarized by Farwell, J., at p. 450.

(i) See also *Craig v. Greer* 1899, 1 Ir. R. 258.

(k) *Patching v. Dubbins*, Kay, 1.

(l) *Snriabrick v. Tunbridge*, 3 Eq. Rep. 243.

(m) *Per Fry, J.*, in *Richards v. Revitt*, 7 Ch. D. 224, where there was a covenant against public-house, etc.

the person injured of his remedy, or warrant a subsequent extension of them to an extent productive of serious damage. (*n*)

And where in several instances the original vendors, who were trustees under a deed of covenant for all the purchasers, had permitted, without interference, several breaches of the restrictive building covenants, it was held that such breaches could not be set up against the plaintiff (who claimed under one of the original purchasers), as they were committed in relation to other portions of the property, not affecting the plaintiff's enjoyment of his plots. (*o*)

Infringing
building line.

Where the plaintiff's house was built two feet in advance of the building line prescribed by a deed of covenant between the original purchasers, it was held that this deviation was too slight and immaterial to effect that plaintiff's rights. (*p*)

It has been held that the sub-purchaser of part of a lot can enforce the stipulations, although, previously to his purchase, his vendor has committed a breach of another part. (*q*)

The right of a purchaser of one plot on a building estate to restrain a breach of a general covenant as to the front building line on an adjoining plot was not barred by immaterial breaches of the covenant as to the front building line; nor by breach of a covenant as to the rear building line, as that was an essentially different covenant, and could be treated as independent of the other. (*r*)

The principle, therefore, as to acquiescence will not be carried so far as to hold a man who has permitted one infringement of a covenant bound to permit another. (*s*)

Degree of
delay.

Acquiescence must be distinguished from delay, for a much less period is required in the case of acquiescence than if there has been merely delay. (*t*)

(*n*) *Bankart v. Houghton*, 27 Beav. 430. And see *Western v. McDermott*, 2 Ch. Ap. 72. It was held that the plaintiff might obtain relief without bringing the other owners before the Court. See *Eastwood v. Lever*, 33 L. J. Ch. 355; *Thompson v. Hukewill*, 11 Jur. N. S. 732; *German v. Chapman*, 7 Ch. D. 271; distinguishing *Roper v. Williams*, Turn. & R. 18.

(*o*) *Jackson v. Winniffrith*, 47 L. T. 243. See Chap. XIX., Sect. I. (13), *ante*, p. 227, as to covenants with respect to "building line."

(*p*) *Ib.*

(*q*) *Rowell v. Satchell* (1903), 2 Ch. 212.

(*r*) *Chitty v. Bray*, 48 L. T. 860. See also *Dowsett v. Ramuz*, Appendix, p. 659.

(*s*) *Lloyd v. London, Chatham & Dover Ry.*, 2 De G. J. & S. 368.

(*t*) *Mitchell v. Steward*, L. R. 1 Eq. 543; *Willmott v. Barber*, 15 Ch. D. 96; *Fullwood v. Fullwood*, 9 Ch. D. 176; *Northumberland v. Bowman*, 56 L. T. 773; *London, Chatham & Dover Ry. v. Bull*, 47 L. T. 413; *Gaskin v. Balls*, 13 Ch. D. 324; *Coles v. Sims*, 5 De G. M. & G. 1; *Kilbey v. Haviland*, 24 L. T. 353. See *ante*, Chap. VIII., p. 93, as to contracts conditioned upon the approval of the landowner.

Where, however, the breach of covenant is of a direct and substantial character, such as the erection of a new building, a structural or architectural alteration of an extensive character, or the carrying on of an obnoxious trade, a shorter delay will, under certain circumstances, bar the plaintiff's title to relief, and preclude him from obtaining the assistance to which he would otherwise have been entitled.

Where there are direct and substantial breaches.

As may be seen from the foregoing decisions, the Court will rarely interfere to pull down a building which has been erected without complaint. In one case, under very special circumstances, however, a building was removed, though no complaint was made until after it was completed; but it should be observed that the building was of such a nature as to be easily altered, and no idea of the damage could have been formed until it was completed. (*u*) Where the defendant purchased land, part of a building estate, on which stood buildings which had for five years been erected in breach of a covenant as to a building line without complaint, and of which the defendant had notice, a mandatory injunction was granted as to buildings erected by the defendant in breach of the covenant, but not as to the old buildings. (*v*)

Whether building will be ordered to be pulled down.

Where a lessee covenanted to build certain additional houses, to keep in repair the houses built and to be built, and at the end of the term to deliver them up to the lessor; and there was a proviso for re-entry; but the additional houses were not built, and for forty-six years the lessor received the rent, and thus waived the obligation to build; it was held that the covenant to deliver up extended to the additional houses, as well as to the houses built at the date of the demise. (*x*)

Waiver of covenant to build.

A short acquiescence may induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by interlocutory order, even when

Acquiescence and delay in the case of an interlocutory injunction.

u *Barter v. Bower*, 23 W. R. 805. See *per* Malins, V.-C., in *Birmingham Joint Stock Co. v. Lea*, 36 L. T. N. S. 847. See *Durrell v. Pritchard*, L. R. 1 Eq. 244; and see *Gaskin v. Balls*, 13 Ch. D. 329.

v *Gaskin v. Balls*, 13 Ch. D. 324. The Judicature Act, 1873, s. 25, sub-s. 8, has not altered the principles on which the Court acts in granting injunctions in this class of cases. *Ib.*, 329, *per* Thesiger, L.J. See *Krech v. Burrell*, 7 Ch. D. 551; *Evans v. Davis*, 10 Ch. D. 747; *Fullwood v. Fullwood*, 9 Ch. D. 176; *Senior v. Pawson*, L. R. 3 Eq. 340. See as the effect of the Judicature Act upon the power of granting injunctions generally, *Beddow v. Beddow*, 9 Ch. D. 89; *Day v. Brownrigg*, 10 Ch. D. 294; *Thomas v. Williams*, 14 Ch. D. 864; comp. *Dicks v. Brooks*, 15 Ch. D. at p. 25, *sed quære*. As to damages after writ, see *Fritz v. Hobson*, 14 Ch. D. 542; *Morris v. Grant*, 24 W. R. 55.

x *Nouvelle v. Flight*, 7 Beav. 521.

applied for on notice; (*y*) but, in general, the principles of the Court are equally applicable to the cases of applications for perpetual, or for interlocutory, injunctions. (*z*)

So long as matters remain *in statu quo*, delay in taking proceedings is not material; (*a*) but delay may be sufficient to induce the Court not to interfere by interlocutory order, though it may not amount to proof of acquiescence. (*b*)

Perpetual
injunction.

An injunction may be made perpetual, on motion, by consent; (*c*) but, otherwise, it will not be granted before the hearing. (*d*)

Undertaking
as to damages
on interlocu-
tory injunc-
tion.

Where an interlocutory injunction has been granted on the usual undertaking as to damages, if it afterwards is established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, though the plaintiff was not guilty of misrepresentation, suppression, or other default in obtaining the injunction. (*e*)

SECT. IV.—DAMAGES.

Although Lord Cairns' Act (*f*) is repealed by the Statute Law Revision Act, 1883, (*g*) under sect. 5, the jurisdiction conferred thereby to award damages in addition to or in substitution for an injunction or specific performance is still in force. (*h*)

Trivial
damage.

It must be clear that there is no appreciable or, at all events, no substantial damage, before the Court will, merely on the ground of the smallness of the damage, withhold its hand from enforcing the covenants. (*i*) The Court will, though the acts may be

(*y*) *Per* Lord Langdale, M.R., in *Gordon v. Cheltenham Ry. Co.*, 5 Beav. 233. See Chap. XXII., Sect. VII. (4) (*a*), p. 312.

(*z*) As to the distinction between interlocutory and other injunctions, see *Patching v. Dubbins*, Kay, 11; *Imperial Gas Co. v. Broadbent*, 7 H. L. 611; *Pulling v. L. C. & D. Ry. Co.*, 33 L. J. Ch. 505; *Johnson v. Wyatt*, 2 De G. J. & S. 18, 25. See *post*, p. 312.

(*a*) *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78.

(*b*) *Att.-Gen. v. Sheffield Gas Co.*, 3 De G. M. & G. 304. See *post*, p. 313.

(*c*) *Morrell v. Pearson*, 12 Beav. 284.

(*d*) *Day v. Snee*, 3 V. & B. 171. See *post*, p. 312.

(*e*) *Griffith v. Blake*, 27 Ch. D. 474, dissenting from dictum of Jessel, M.R., in *Smith v. Day*, 21 Ch. D. 421.

(*f*) 21 & 22 Vict. c. 27.

(*g*) 46 & 47 Vict. c. 49, s. 3.

(*h*) *Per* Baggaillay, L.J., in *Sayers v. Collyer*, 28 Ch. D. 103. See *Holland v. Worley*, 26 Ch. D. 578; *Hipgrave v. Case*, 28 Ch. D. 356.

(*i*) *Per* Turner, L.J., in *Lloyd v. L. C. & D. Ry. Co.*, 2 De G. J. & S. 580. See *Western v. McDermott*, L. R. 1 Eq. 499. See cases cited Chap. XXIII., Sect. VII. (4) (*a*), p. 312, under "Light," *post*, p. 286. In *Johnstone v. Hall*, 2 K. & J. 414, relief was refused to a remainder-man, no special damage being proved.

beneficial, restrain a violation of a deliberate engagement. (k) And, in the case of an infringement of a covenant by using premises as a school, it was observed that "the feeling of anxiety is damage." (l) An injunction will be granted in the absence of proof of substantial damage, where the defendant claims a right to continue doing that which the Court holds he is not entitled to do. (m)

The Court has power to refuse an injunction, although no case is established for granting damages in substitution for the injunction, and, in such a case, may dismiss an action to enforce a covenant with costs; (n) Lord Cairns' Act applied even where the damage was infinitesimal. (o)

k. *Dickenson v. Grand Junction Canal Co.*, 15 Bear. 260. See *Tipping v. Eekersley*, 2 Kay & J. 264; *Lord Manners v. Johnson*, 1 Ch. D. 673.

l. *Kemp v. Sober*, 1 Sim. N. S. 520.

m. *Att.-Gen. v. Acton L. Bd.*, 23 Ch. D. 221. In the case of an illegal act causing injury to the public, see *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 Ch. D. 752.

n. *Supra.*

o. *Sayers v. Collyer*, *supra*. See also *per* Fry, L.J., as to the amount of acquiescence on the part of the plaintiff which may be sufficient to induce the Court to give damages instead of an injunction. See *Holland v. Warley*, 26 Ch. D. 578.

CHAPTER XXI.

RIGHTS AND LIABILITIES OF ASSIGNEES UNDER COVENANTS RELATING TO BUILDING.

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SECT. I.—COVENANTS RUNNING WITH THE LAND OR REVERSION.

(1) WHEN COVENANTS ARE SAID TO "RUN WITH THE LAND."

A COVENANT is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. (a) The doctrine only applies in its

(a) *Spencer's Case*, 1 Sm. L. C. 65 (11th ed.), p. 55.

integrity to covenants between lessor and lessee, not to covenants in building grants in fee. (*b*)

As concerns estates in fee simple, although covenants may be so worded that a grantee of the land may take the benefit of them at law, the burthen of affirmative covenants cannot be made to devolve upon the covenantor's successors in title either at law or in equity. Further, it only applies to demises under seal. (*c*)

A covenant is said to run with the reversion when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the reversion. (*d*)

The leading authority on covenants running with the land is *Spencer's Case*, (*e*) where the following rules are laid down:—

(*a*) *Assigns not named*.—First.—Covenants which run with the land, though assigns be not named; and of this kind are covenants “which extend to a thing in ~~esse~~ part of the demise,” as a covenant to repair the demised premises.

Under this heading the following covenants have been held to run: covenants for quiet enjoyment, (*f*) for further assurance, (*g*) to pay rent, (*h*) to repair, (*i*) to put in repair or leave in repair, (*k*) not to assign without licence, (*l*) not to carry on a particular trade on the premises, (*m*) to use the premises as a private dwelling-house only, (*n*) to insure against fire, (*o*) to conduct the business of an inn in a proper and orderly manner, (*p*) not to sell on the premises any ale other than ale purchased of the lessors. (*q*)

Instances of
covenants
which run.

(*b*) *Assigns named*.—Secondly.—Covenants which will bind the assignees if named, but not otherwise, and to this class belong covenants to build a house, etc., on the land demised. (*r*)

(*b*) *Austerberry v. Corp. of Oldham*, 29 C. D. 750; *Haywood v. Brunswick*, B. S. 8 Q. B. D. 403; *Re Drew's Estate*, L. R. 2 Eq. 206; *Holson v. Coppard*, 29 Beav. 4.

(*c*) *Elliott v. Johnson*, L. R. 2 Q. B. 120.

(*d*) *Spencer's Case*, *supra*.

(*e*) *Supra*.

(*f*) *Campbell v. Lewis*, 3 B. & Ald. 392.

(*g*) *Kingdon v. Nottle*, 4 M. & S. 53.

(*h*) *Williams v. Bosanquet*, 1 B. & B. 238.

(*i*) *Wakefield v. Brown*, 9 Q. B. 223.

(*k*) *Martyn v. Clue*, 18 Q. B. 661; *Dean of Windsor's Case*, 5 Co. 24 a.

(*l*) *Williams v. Earle*, L. R. 3 Q. B. 739.

(*m*) *Congleton (Mayor) v. Pattison*, 10 East, 136; *Wilson v. Hart*, L. R. 1 Ch. 463; *Patman v. Harland*, 17 Ch. D. 353.

(*n*) *Wilkinson v. Rogers*, 12 W. R. 119.

(*o*) *Vernon v. Smith*, 5 B. & Ald. 1.

(*p*) *Fleetwood v. Hull*, 23 Q. B. D. 35, applied in *White v. Southend Hotel Co.* (1897), 1 Ch. 767, where the assign, observing the covenant, was also held entitled to the benefit of the proviso for the abatement of rent.

(*q*) *Clegg v. Hands*, 44 C. D. 503.

(*r*) *Spencer's Case*, *supra*.

Under this head come all covenants respecting a thing not in existence at the date of the covenant, but which, when it comes into existence, will be annexed to the land.

In *Spencer's Case* it was held that a covenant by the lessee to build a house, or other new building, upon the demised premises was personal to him only; but it was said that, if the lessee had covenanted for himself *and his assigns* that they would build, the covenant would bind the assignee. A covenant, not naming assigns, to erect buildings of a certain description on the demised premises does not bind the assigns of the covenantor. (s)

Covenant to repair and leave in repair.

In *Minshull v. Oakes* (t) the Court did not in terms overrule *Spencer's Case*, but suggested a distinction, and the rule as to covenants to repair buildings already completed was extended to buildings not erected at the date of the demise. (u)

For covenants to run with the land under this rule, it is necessary that they should affect the land, do benefit to the land, or affect the rent issuing out of the land; (v) and in addition to covenants to build may be mentioned a covenant to convey coals along a railway to be constructed on the demised land, (x) and a covenant not to assign without licence, which, it appears, binds the assigns whether named or not. (y)

(c) *Covenants simply collateral*.—Thirdly.—Covenants which are simply collateral, and which, as they do not concern the subject of the demise, will not bind assignees, whether named or not; as a covenant to build a house on land not parcel of the demise. (z)

Meaning of "collateral."

By the term collateral covenants, which do not pass to the assignee, is meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. (a)

Collateral covenants which do not run.

Under this head it has been held that the following covenants do not run—viz. a covenant that the lessor will not dispose of land adjoining the demised premises without first offering it to the lessee; (b) so, if the case is reversed, and the lessee covenant to

(s) *Re Fawcett and Holmes*, 42 Ch. D. 150; *Anon.* 12 Mod. 384, case 643; *Cockson v. Cock*, Cro. Jac. 125. See *Gray v. Cuthbertson*, 2 Chit. 482; *Congleton (Mayor) v. Pattison*, 10 East, 135; *Smith v. Arnold*, 3 Salk. 4; *Batty v. Wells*, 3 Wils. 25.

(t) 27 L. J. Ex. 194.

(u) *Greenaway v. Hart*, 14 C. B. 340; *Doughty v. Bowman*, 11 Q. B. 444.

(v) *Haywood v. Brunswick*, B. S. 8 Q. B. D. 403.

(x) *Hemingway v. Fernandez*, 13 Sim. 228.

(y) *Williams v. Earle*, L. R. 3 Q. B. 739; *West v. Dobb*, L. R. 4 Q. B. 634.

(z) *Spencer's Case*, *supra*; *Mayho v. Buckhurst*, Cro. Jac. 438.

(a) *Per Best, J.*, in *Vernon v. Smith*, 5 B. & Ald. 11. See *Phillips v. Miller*, L. R. 10 C. P. 420.

(b) *Collison v. Lettson*, 6 Taunt. 224.

give a right of pre-emption of other land to the lessor, the assignee of the lessee, though also owner of the other land, is not bound by the covenant. (c)

The doctrine of covenants running with the land only applies where the demise is by deed; it does not apply to a tenancy created by agreement not under seal. (d) But if a tenant not holding by demise under seal assign his tenancy or die, and his assigns or personal representatives continue to pay rent and the landlord accepts it, or by other unequivocal act shows that he accepts the new tenant, the new tenant will hold on the terms of the original agreement. (e)

At common law covenants ran with the land, but not with the reversion; (f) but by the Statute 32 Henry VIII. c. 34, which applies to leases under seal only, (g) such covenants were made to run also with the reversion; so that if the covenants be of a kind that run with the land, and not collateral covenants, the assignee of the lessor can sue, or be sued, on the same covenants under the statute. (h)

Covenants are divisible, and upon the severance of the land, or the reversion, the covenants run with the severed parts. (i)

(2) EFFECT OF CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

SECTs. 10 and 11 of the Conveyancing Act, 1881, (k) effect an extension of the principle of the above-mentioned Act, 32 Hen. Where lease made under a power.

(c) *Keppell v. Bailey*, 2 M. & K. 317, 514. See also *Doughty v. Bowman*, 11 Q. B. 444; but see *Martyn v. Clue*, 18 Q. B. 681; *Thomas v. Hayward*, L. R. 4 Ex. 311; *Gower v. Postmaster-General*, 57 L. T. 527.

(d) *Elliott v. Johnson*, L. R. 2 Q. B. 120.

(e) *Ib.*; *Buckworth v. Simpson*, 1 C. & M. & R. 831; *Smith v. Eggington*, L. R. 9 C. P. 145.

(f) *Thursby v. Plant*, 1 Wms. Saund. 240, n. (c); *Stevens v. Copp*, L. R. 4 Ex. 20.

(g) *Smith v. Eggington*, L. R. 9 C. P. 145, *supra*; *Brydges v. Lewis*, 3 Q. B. 603.

(h) *Standen v. Christmas*, 10 Q. B. 135; 5 Co. 18 a, in *Spencer's Case*, *supra*; *Thursby v. Plant*, *supra*; *Hickford v. Parson*, 5 C. B. 920; *Martyn v. Williams*, 1 H. & N. 817; *Norvil v. Pascoe*, 35 L. J. Ch. 85; *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(i) *Twynnam v. Pickard*, 2 B. & Ald. 103; *Swansea (Mayor) v. Thomas*, 10 Q. B. D. 48; *Roberts v. Holland*, [1893] 1 Q. B. 665.

(k) 41 & 45 Vict. c. 41, s. 10: "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, Rent and benefit of leasees' covenants to run with reversion."

VIII. c. 34, as regards leases made since Dec. 31, 1881. The covenant must have been entered into with the legal owner of the reversion, in order to be within that Act; but now, under sect. 10 of the Conveyancing Act, 1881, wherever there is a legal reversion, that is, where a lease is made by means of an ordinary power, or a statutory power, as under sect. 18 of that Act, or under the Settled Land Act, 1882, enabling a legal term to be carved out of the reversion, the lessee's covenants are annexed to and run with the reversion, and are no longer covenants in gross. So also, under sect. 11, the covenants of a lessor, who has power to bind the reversionary estate, will run with that estate and bind the reversioner, though the lessor be tenant for life only, or mortgagor. (*l*)

Lease by
mortgagor.

If a mortgagor grants a lease without having a power to bind the mortgagee, sect. 11 of the above Act will not apply, as no legal term is created, and there is no reversion. Upon a reconveyance to the mortgagor, the lease takes effect by estoppel.

From the above remarks it will be seen that it is still most essential that assigns should be named when it is wished that covenants of the second class above referred to should run with the land. (*m*)

It should be observed that in some cases the terms of a covenant may operate as a grant of an incorporeal hereditament, so as to render it unnecessary to determine whether, *quâ* covenant, the burden of it runs with the land. (*n*)

received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

And s. 11 enacts that "the obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

(*l*) *Municipal, etc., Building Society v. Smith*, 22 Q. B. D. 70; *Wilson v. Queen's Club*, [1891] 3 Ch. 522.

(*m*) *Re Fawcett and Holmes*, 42 C. D. 150.

(*n*) *Rowbotham v. Wilson*, 8 H. L. C. 348.

Obligation
of lessor's
covenants
to run with
reversion.

SECT. II.—COVENANTS ENFORCEABLE BY REASON OF NOTICE.

(1) THE DOCTRINE OF NOTICE.

The benefit and burden of covenants of the class hereinafter mentioned, although they may not run at law, may be enforceable by reason of notice to the party affected.

If a man take land with notice of a *restrictive* covenant, although not binding on him at law, entered into by a person under whom he claims, he is bound to observe it, and it is quite immaterial whether assigns are named or not. (*o*)

The rule only applies to such a covenant as can be complied with without expenditure of money. (*p*) Where there is a negative covenant, express or implied, (*q*) as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes to enforce the covenant. The purchaser takes the estate subject to the equitable burden, with the qualification that, if he acquires the legal estate for value without notice, he is freed from the burden. (*r*)

Thus the following covenants cannot be enforced, even against a purchaser with notice, if they do not run at law—viz. a covenant to repair a house, (*s*) or a road; (*t*) a covenant giving a right of pre-emption, nor would such a covenant run at law; (*u*) a covenant to supply water to houses to be built on the land. (*w*)

But the following have been enforced, viz.: to leave land unbuilt on; (*x*) that land shall be dealt with in a particular manner, or that all houses shall be uniformly built; (*y*) not to erect an hotel without consent; (*z*) restricting the height of buildings; (*a*) restricting the trades to be carried on; (*b*) a covenant not to buy,

Application
of the rule.

Covenants
which cannot
be enforced
unless they
run at law.

Covenants
(with notice)
which can be
enforced.

(*o*) *Tulk v. Moxhay*, 2 Phill. 774; *Teape v. Douse*, 21 T. L. R. 271.

(*p*) *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; *Austerberry v. Corp. of Oldham*, 29 Ch. D. 750; *Hall v. Ewen*, 37 Ch. D. 74.

(*q*) *Clegg v. Hands*, 44 Ch. D. 503.

(*r*) *L. & S.-W. Ry. Co. v. Gomm*, 20 Ch. D. 562.

(*s*) *Haywood v. Brunswick Building Society*, *supra*.

(*t*) *Austerberry v. Corp. of Oldham*, 29 Ch. D. 750, *supra*.

(*u*) *L. & S.-W. Ry. Co. v. Gomm*, *supra*.

(*w*) *Coke v. Chilcott*, 3 Ch. D. 694; overruled by *Austerberry v. Corp. of Oldham*, *supra*.

(*x*) *Tulk v. Moxhay*, *supra*; *Keates v. Lyon*, L. R. 4 Ch. 218.

(*y*) *Western v. McDermott*, L. R. 2 Ch. 72; *Mann v. Stephens*, 15 Sim. 377; *Whatman v. Gibson*, 9 Sim. 196; *Birmingham Joint Stock Co. v. Lea*, 36 L. T. N. S. 843; *Coles v. Sims*, Kay, 56.

(*z*) *Jay v. Richardson*, 30 Beav. 563. See *Nicoll v. Fenning*, L. R. 19 Ch. D. 258.

(*a*) *Western v. McDermott*, *supra*.

(*b*) *Wilson v. Hart*, L. R. 1 Ch. 563; *Feilden v. Slater*, L. R. 7 Eq. 523; *Patman v. Harland*, L. R. 17 Ch. D. 333; *Hall v. Ewen*, *supra*.

sell, or dispose of, on the premises, any ales other than ale purchased of the lessors. (c)

Rule applies
to a mere
agreement.

The rule applies even to a mere agreement; it is not necessary that there should be a covenant. (d) The restriction may be contained in a general deed of covenant executed by all the purchasers of land on the estate, or contained in the purchase deed itself; but this does not affect the rule, though it may be important on the question who is entitled to enforce the covenant. (e)

Notice of a restrictive covenant puts the assignee of the land in the same position as if he had been a party to the covenant. The covenantee, suing on breach of the covenant, is no more bound to prove substantial damage in one case than in the other, but the Court will proceed exactly as if the assignee with notice were a party to the covenant. (f)

(2) CONSTRUCTIVE NOTICE.

Constructive
notice of
restrictive
covenants as
to building.

Lastly, the doctrine upon this subject is further extended by the principles of constructive notice. In order that an alienee may be bound in equity, it is not necessary that he should have formal notice of the covenant.

Definition of
constructive
notice.

Constructive notice has been defined as knowledge which the Court imputes to a person upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated. (g) The Conveyancing Act of 1882 (h) has introduced special provisions limiting the doctrine, but we will, before referring to the Act, consider some of the cases bearing on this subject.

Duty of
purchaser.

As a general rule, a purchaser is bound to inquire into the title of his vendor, and will be affected with notice of what appears upon the title, whether he inquire or not, and this rule applies to a purchaser of leasehold estates, as much as to a purchaser of freehold estates, and it applies equally to a tenant for a term of years. (i)

(c) *Clegg v. Hands*, *supra*; *Catt v. Tourle*, L. R. 4 Ch. 654; *Luker v. Dennis*, L. R. 7 Ch. D. 227; but see *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; *Davis v. Foreman*, [1894] 3 Ch. 654.

(d) *Tulk v. Moxhay*, *supra*; *Spicer v. Martin*, 14 A. C. 12.

(e) *Post*, p. 261.

(f) *Richards v. Revitt*, L. R. 7 Ch. D. 224. As to liability of an occupier, see *Mander v. Fulcke*, [1891] 2 Ch. 544.

(g) *Hewitt v. Loosemore*, 9 Hare, 449, 455. See also the definition in *Plumb v. Fluit*, 2 Anst. 438, and cf. with the definition in *Dart*, p. 861.

(h) 45 & 46 Vict. c. 39. See this section, and the cases cited in note (b), p. 260, *post*.

(i) *Per* Turner, L.J., in *Wilson v. Hart*, L. R. 1 Ch. 467; *per* Wigram, V.-C., in *West v. Reid*, 2 Hare, 260; *Worthington v. Morgan*, 16 Sim. 547.

Where, in the deed of conveyance, a restrictive covenant was entered into by the purchaser in fee, who leased to a tenant without such covenant, it was held that the tenant, though he had no notice in fact, was put upon inquiry, and was fixed with constructive notice of the covenant. (*k*)

The rule in *Wilson v. Hart*.

An under-lessee may be restrained from breaking restrictive covenants contained in the original lease, (*l*) or entered into, with respect to the property, by any person claiming through the original lessee, (*m*) although they are not repeated in the sub-lease. (*n*) It has been held (*o*) that a person who contracts for an under-lease has constructive notice of the provisions of the original lease, only when he has had a fair opportunity of ascertaining for himself what they are. And this principle applies to an agreement to purchase an existing lease, as well as to an agreement to take an under-lease. (*p*) But these were cases of actions upon contracts; and it does not follow that, if the under-lease or the assignment had actually been executed, the under-lessee or assignee would not have been bound.

Under-lessee may be affected with notice.

Although the lessee or purchaser may have contracted with his lessor or vendor upon conditions restricting or precluding him from inquiry into the title, he will be equally fixed with constructive notice of a covenant which would have been disclosed on forty years' abstract. (*q*)

Conditions, etc., restricting inquiry into title.

The Vendor and Purchaser Act, 1874, (*r*) has not reversed the rule laid down in *Wilson v. Hart*, (*s*) so far as it concerns

Effect of the Vendor and Purchaser Act, 1874.

(*k*) *Wilson v. Hart*, L. R. 1 Ch. 467. See this case commented on in *Patman v. Harland*, 17 Ch. D. 353. See *Thornwell v. Johnson*, 50 L. J. Ch. 641; Sug. V. & P. ch. x. s. 1, pl. 12; *Feilden v. Slater*, L. R. 7 Eq. 523; *Parker v. Whyte*, 1 H. & M. 167; *Jay v. Richardson*, 30 Beav. 563; *Clements v. Welles*, L. R. 1 Eq. 200; *Mitchell v. Stewart*, L. R. 1 Eq. 541; *Dennett v. Atherton*, L. R. 7 Q. B. 316; *Jones v. Bone*, L. R. 9 Eq. 674; *Evans v. Davis*, 10 Ch. D. 747.

(*l*) *Parker v. Whyte*, 1 H. & M. 167. See *Thornwell v. Johnson*, 50 L. J. Ch. 641, *infra*. See *ante*, p. 240.

(*m*) *Clements v. Welles*, L. R. 1 Eq. 200.

(*n*) See *Robson v. Flight*, 4 Do G. J. & S. 608; *Herbert v. Maclean*, 12 Ir. Ch. R. 84.

(*o*) *Hyde v. Warren*, 3 Ex. D. 72. That case was questioned, on another point, in *Eastern Telegraph Co. v. Dent* (1899), 1 Q. B. 835. See *Lewis v. Bond*, 18 Beav. 85; *Cosser v. Collinge*, 3 My. & K. 283; *Grosvenor v. Green*, 28 L. J. Ch. 173; *Smith v. Capron*, 7 Hare, 185.

(*p*) *Reeve v. Berridge*, 20 Q. B. D. 523.

(*q*) *Robson v. Flight*, 4 Do G. J. & S. 608; *Re Cox and Neve*, [1891] 2 Ch. 110. See *Morland v. Cook*, L. R. 6 Eq. 252; but see *Patman v. Harland*, 17 Ch. D. 353.

(*r*) 37 & 38 Vict. c. 78, s. 2. See the section, *ante*, p. 62; and see, too, the further provisions of the Conveyancing Act, 1881, *ante*, p. 62.

(*s*) L. R. 1 Ch. 467, *supra*.

lessees; (t) it only makes an express stipulation necessary for obtaining the title. (u) "You may bargain to shut your eyes, but if you do wilfully shut your eyes, whether as a bargain or not, you must be liable to the consequences." (w)

So a sub-tenant is liable to a restrictive covenant entered into by the purchaser of the freehold for himself and his assigns, though neither the sub-tenant nor his lessor has actual notice of it, and notwithstanding sect. 2 of the above Act, preventing the examination of the title to the freehold, unless by agreement. (x)

Precautions necessary where the lessee is to build.

It follows, therefore, that the lessee should, especially if he is to build upon the demised premises, if possible, either investigate the lessor's title, or obtain an *unqualified* covenant for quiet enjoyment during the term, without any interruption or disturbance by the lessor, "*or by any other person or persons whomsoever*;" i.e. against all persons having lawful title. (y)

Doctrine of constructive notice is only in favour of third parties.

It should be remembered that the doctrine of constructive notice, with respect to covenants restricting the manner of building on the land, will operate against a purchaser only for the protection of the rights and equities of third parties; it does not apply as between the contracting parties themselves, and has nothing to do with the rights and liabilities of vendors and purchasers as between themselves. (z)

Lessee not affected where the restrictive covenant as to building could not have been discovered.

The lessee or purchaser will not be affected with constructive notice of restrictive covenants, by reason merely of neglecting to inquire, where he could not, by doing so, have discovered them by a proper and full investigation of the vendor's title. (a)

(t) See Davidson (1876), vol. v. pt. 1, 76.

(u) See the judgment of Jessel, M.R., in *Patman v. Harland*, 17 Ch. D. 353, *supra*; *Thornewell v. Johnson*, 50 L. J. Ch. 641.

(w) *Per* Jessel, M.R., in *Patman v. Harland*, *supra*.

(x) *Thornewell v. Johnson*, 50 L. J. Ch. 641.

(y) *Onions v. Cohen*, 2 H. & M. 354.

(z) *Caballero v. Henty*, L. R. 9 Ch. 447; *Drysdale v. Mace*, 2 Sm. & G. 225. See *per* Wigram, V.-C., in *Wilson v. Short*, 6 Hare, 366; *per* Cranworth, L.J., in *Reynell v. Spyre*, 1 De G. M. & G. 710. But see *Patman v. Harland*, 17 Ch. D. 353.

(a) *Carter v. Williams*, L. R. 9 Eq. 678. See *per* Leach, M.R., in *Hanbury v. Litchfield*, 2 M. & K. 633; *Jones v. Smith*, 1 Hare, 43; 1 Ph. 244, and cases note (z), *supra*. As to constructive notice under the Conveyancing Act, 1882, see s. 3 of that Act, and *Mander v. Falcke* (1891), 2 Ch. 554; *Bailey v. Barnes*, [1894] 1 Ch. 25; *Saffron Walden Building Society v. Rayner*, 14 Ch. D. 406; *Agra Bank v. Barry*, L. R. 7 H. L. 135; *Rolland v. Hart*, L. R. 6 Ch. 678; *Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. D. 160; *Cave v. Cave*, 15 Ch. D. 639; *Kettlewell v. Watson*, 21 Ch. D. 685. Cf. *Fuller v. Bennett*, 2 Hare, 394, probably modified by this section; *Hargreaves v. Rothwell*,

(3) DURING WHAT TIME ASSIGNEE IS LIABLE.

It may be here observed that the assignee of a term is liable on the covenants which run with the land, although he has not taken actual possession; so also the assignee of an assignee for breaches happening after the assignment to him, (b) and before any assignment over by him. (c)

SECT. III.—ENFORCEMENT OF RESTRICTIVE COVENANTS BY ASSIGNS, ETC.

(1) WHO CAN ENFORCE RESTRICTIVE COVENANTS.

(a) *The Covenantee or his heirs, etc.*—The covenantee (d) or his heirs, executors, or administrators, can, of course, enforce covenants. In covenants executed since the Conveyancing Act, 1881, it is not necessary to specify the heirs, executors, or administrators of the covenantee.

(b) *Assigns.*—Restrictive covenants can also be enforced by an assign of the benefit of the covenant. (e) In *Clegg v. Hands* (f) the good-will of a brewery was assigned, and the benefit of covenants in a lease of a tied public-house, and it was held that the assignee could enforce the restrictive covenants.

Assign of benefit of covenant.

(c) *A Purchaser of other part of the same Estate.* (g) Hence

1 Keen, 160, can no longer be regarded as law; *Tulk v. Moxhay*, 2 Phill. 774. "Purchaser," as used in the section, includes a mortgagee and a lessee, s. 1, sub-s. 4, ii. The section applies to purchases made either before or after the commencement of the Act; except where an action is pending at the commencement of the Act. Sub-s. (4).

(b) *Paul v. Nurse*, 8 B. & C. 486; *Walker v. Reeves*, 2 Doug. 461, n.; *Taylor v. Shum*, 1 Bos. & P. 21.

(c) *Beardnan v. Wilson*, L. R. 4 C. P. 57. An assignee may assign over to a man of straw, and get rid of his liability except as to previous breaches, *Onslow v. Corrie*, 2 Mudd. 390. See also *Churchwardens of St. Saviour's, Southwark, v. Smith*, 1 W. Blac. 351; *Grescot v. Green*, 110k., 177; *Brittin v. Vaur*, 1 Lutw. 360; *Hawkins v. Sherman*, 3 C. & P. 459. See *Bennett v. Herring*, 3 C. B. N. S. 370, as to liability to ejectment for forfeiture, arising out of a breach of covenant to complete certain houses (in carcase), committed prior to the assignment.

(d) See *Buckle v. Fredericks*, 44 Ch. D. 244, where the covenant was with a lessor and also with other lessees of part of the estate.

(e) *Manners v. Johnson*, 1 Ch. D. 673; *Clegg v. Hands*, 44 Ch. D. 503; *Master v. Hansard*, 4 Ch. D. 718.

(f) 44 Ch. D. 503.

(g) *Renals v. Cowlishaw*, 9 Ch. D. 125; affirmed 11 Ch. D. 866; per Lord Macnaghten, *Spicer v. Martin*, 11 A. C. 12. See, too, *Nicoll v. Fenning*, 19 Ch. D. 254; *Osborne v. Bradley* (1903), 2 Ch. 446, and at p. 247, ante.

Purpose of the covenant to be considered.

it is important to consider the expressed, or otherwise apparent purpose or object of the restrictive covenant, in reference to its being intended to be annexed to other property, or to its being only entered into to enable the covenantee more advantageously to deal with his property, and for his own benefit; in which case, on a grant or demise to other persons, without any mention of the covenant, the benefit of the covenant does not enure to the subsequent grantees or lessees.

(2) ILLUSTRATIVE CASES.

Illustrative cases.

These general propositions will now be made clearer by a reference to the decisions upon which they are founded. When, accordingly, building land is sold, and the purchaser covenants to build upon, or use, the lands in a certain restricted manner with reference to the adjoining land of the vendor, a purchaser of the adjoining land, to whom it is conveyed with the benefit of the covenant, becomes entitled to that benefit in equity, although the covenant be not one running with the land at law. (*h*)

Restrictive covenants to be assigned with the land expressly or impliedly.

But, on the other hand, restrictive covenants of this description must be expressly or impliedly assigned with the land to which they relate in order to entitle a purchaser or assignee to the benefit of them. It must appear that the benefit of the covenant was part of the subject-matter of the purchase. (*i*)

Where the covenant is for the benefit of lessor or grantor.

Master v. Hansard (*k*) is an illustration of the proposition that, if a man, on disposing of building land, takes a restrictive covenant for his own benefit, and then disposes of other land to other persons, without any notice of the covenant, the benefit of the covenant will not enure to subsequent grantees or lessees. It would be too great an enlargement of the doctrine of implied obligation, to raise by implication a right in the nature of an equitable assignment of the benefit of such a covenant. (*l*) Nor will the plaintiff, under the circumstances just stated, be entitled to relief on the principle that the lessor could not derogate from

Principle of derogation

(*h*) *Western v. McDermott*, L. R. 2 Ch. 72. See also *McLean v. McKay*, L. R. 5 P. C. 327; *Harrison v. Good*, L. R. 11 Eq. 338. And see *Lord Manners v. Johnson*, 1 Ch. D. 670. See *Thornewell v. Johnson*, 50 L. J. Ch. 641; *Eastwood v. Lever*, 33 L. J. Ch. 355. See *Child v. Douglas*, Kay, 560.

(*i*) *Keates v. Lyon*, L. R. 4 Ch. 218, where *Child v. Douglas*, *supra*, is considered. See *Birmingham Joint Stock Co. v. Lea*, 36 L. T. N. S. 843.

(*k*) *Master v. Hansard*, 4 Ch. D. 718; *Renals v. Cowlshaw*, 11 Ch. D. 866; and see *Nalder, etc., Brewery Co. v. Harman*, 82 L. T. 594, and 83 L. T. 257; *Osborne v. Bradley* (1903), 2 Ch. 446.

(*l*) *Master v. Hansard*, 4 Ch. D. 722. See also *Renals v. Cowlshaw*, *supra*.

his own grant. "It would be a novel extension of that doctrine to hold that not only a grantor cannot do anything to derogate from his own grant, but that he is obliged to take active steps to prevent other persons from doing what he might not himself do." (m)

from grant
has no appli-
cation.

The subject has been before the Court on numerous occasions recently, and the law seems to be now completely elucidated. (n)

(3) EFFECT OF SELLING IN BUILDING LOTS.

One circumstance which has always been held to be cogent evidence of an intention that the covenants shall be for the common benefit of the purchasers is that the several lots have been laid out for sale as building lots, as in *Mann v. Stephens*, (o) *Western v. McDermott*, (p) *Coles v. Sims*; (q) or, as it has been sometimes said, that there has been a "building scheme;" *Renals v. Cowlishaw*. (r) In some instances, the exhibition to intending purchasers of a plan embodying such a scheme has been relied on. Obviously, however, this is a mere detail of evidence, (s) and is by no means necessary in order to establish the existence of such a scheme.

The Court will not imply mutual covenants between a number of purchasers unless the persons and the plots of land which are to be bound are in some way defined. (t)

Plots should
be defined.

(4) COVENANT TO BUILD PRIVATE HOUSES.

In *Spicer v. Martin* (u) the site was laid out in accordance with a building scheme. The houses were to be built as private houses, and to be used for no other purpose: a covenant to that effect was imposed on the builder who bought the ground, and intended to parcel it out and sell it or let it again. The houses were actually built as private houses, and offered to the public as such, and each

(m) *Per James, L.J.*, in *Master v. Hansard*, *supra*.

(n) See *per Wills, J.*, *Nottingham Patent Brick and Tile Co. v. Butler*, 15 Q. B. D. 263; affirmed on appeal, 16 Q. B. D. 778.

(o) 15 Sim. 377.

(p) L. R. 2 Ch. 72, cited *supra*, p. 246.

(q) *Kay*, 56.

(r) 9 Ch. D. 125; 11 C. D. 865, cited *supra*.

(s) See *Tucker v. Fowler*, [1893] 1 Ch. 195; *Graham v. Craig* (1902), 1 I. R. 264, and see further as to plans, *post*, p. 265.

(t) *Osborne v. Bradley* (1903), 2 Ch. 446. As to sale of lots by auction, see *Collins v. Castle*, 36 Ch. D. 243.

(u) *Spicer v. Martin*, 14 A. C. 12.

person who took one of the houses was required to enter into the same restrictive covenant, and every lessee had, in one way or another, notice of this. It was held that one of such lessees was entitled to an injunction restraining the owners of others of the houses from converting them into an hotel.

(5) INJUNCTION AGAINST LESSOR.

The lessee of part of a building estate may enforce restrictive covenants by obtaining an injunction to restrain the lessor from granting a lease of other plots free from restriction; (*v*) but where an estate is sold in lots at successive sales under a building scheme imposing restrictive stipulations on the lots, a purchaser can only enforce the stipulations against property shown as lotted in the plan and subject to the stipulations at the sale at which he purchases. (*w*)

(6) INJUNCTION TO RESTRAIN MODIFICATION OF THE TERMS OF A MUTUAL RESTRICTIVE COVENANT.

In *Mackenzie v. Childers* (*x*) trustees offered a building estate in plots for sale by auction, referring to a plan and conditions of sale which referred to a deed of mutual covenants which was to be executed by the vendors and each purchaser. (*y*)

Twenty years after, the trustees were proposing to sell other lots of the estate free from the conditions, but they were restrained in an action brought by purchasers who had executed the deed of covenant; it being held that no formal words are necessary to make a covenant in such a deed. A statement of a binding intention on the part of the vendors who execute the deed, made on the face of it, for the purpose of inducing purchasers to buy, is as good a covenant as could be made by the most formal words.

(*v*) *Mackenzie v. Childers*, 43 Ch. D. 265; *Spicer v. Martin*, 14 A. C. 12.

(*w*) *Rowell v. Satchell* (1903), 2 Ch. 212. As to the effect of s. 84 of the Land Transfer Act, 1875, s. 84, see *Ground Rent Development Co. v. West* (1902), 1 Ch. 674.

(*x*) 43 Ch. D. 188.

(*y*) The deed contained a recital that it was intended to be part of all future contracts that the several purchasers should execute the deed and be bound by the stipulations in it; and thereby each purchaser covenanted with the vendors and with the other purchasers to conform to the restrictions on building therein; but there was no express covenant by the vendors to the like effect.

But where the vendor has not power to fetter the land retained by him, the doctrine does not apply. (z)

Where vendor has no power to fetter the land.

(7) EFFECT OF EXHIBITING PLANS.

It is not in itself sufficient that a vendor prepares a plan of a building estate showing lots with houses marked on them, and that an intending purchaser is shown that plan, and that his agreement with regard to a plot purchased by him happens to be on a printed form with written alterations; in such a case the purchaser is not entitled to assume that the whole estate is governed by a building scheme that each plot shall, without variation, be built on strictly in accordance with the indications on the plan, and shall of necessity be governed by the printed portions of the agreement. (a)

(8) ADJOINING PROPERTY OF VENDORS.

The fact that the vendors have other adjoining property is not sufficient to rebut the general rule, and does not in itself show that the restrictions are personal only; so that in such case, where all the lots offered for sale subject to restrictive covenants are not sold, a person who has contracted to buy one lot is entitled to the benefit of a contract by the vendors implied in the conditions of sale, that the vendors would, as to the lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to observe, and, further, the purchaser is entitled to have such obligations of the vendors expressed in the conveyance to him of his lot. (b)

(9) COVENANT MAY BE PERSONAL IN TERMS.

It may appear from the wording of the covenant, that it is personal only, and not intended to bind assigns; thus, in *Re Fawcett and Holmes*, (c) the covenant was, that the purchaser, *his heirs, executors, administrators, and assigns* would make certain payments and do certain acts, and the covenant proceeded, "and

(z) *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208, followed in *Holford v. Acton Urban Council* (1895), 2 Ch. 240.

(a) *Tucker v. Voules*, [1893] 1 Ch. 195; and see *Everett v. Remington*, [1892] 3 Ch. 148; *Graham v. Craig* (1902), 1 I. R. 264.

(b) *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 312.

(c) 42 Ch. D. 150.

the said purchaser, on erecting any building, shall only erect buildings" of a certain description; it was held that the restrictive covenant was personal only.

(10) SUBDIVISION OF A PLOT.

Upon the subdivision of a plot, part of a building estate subject to restrictive covenants, the owner of one part of the plot cannot, in the absence of special agreement as to user of the part of the plot, enforce the covenants against the owner of the other part, though, of course, the owners of other plots might be able to do so. (*d*)

(11) LESSOR WHO HAS PARTED WITH ALL HIS INTEREST.

A lessor who has parted with his interest in the property may enforce restrictive covenants, where he has made himself liable to other lessees in case the covenant should be infringed. (*e*)

If the original covenantor has parted with all his interest and is in no way in fault, he is not properly made a defendant to an action to restrain a breach of a restrictive covenant. (*f*)

(12) RESTRICTION OF TRADES.

When a lessor covenants not to carry on, or allow to be carried on, certain trades on his adjoining land, or that a lessee shall have the exclusive right to sell a certain class of goods on the lessor's estate, he will be restrained from carrying on or allowing the specified trades by other tenants. (*g*)

(*d*) *King v. Dickson*, 40 Ch. D. 596.

(*e*) *Spencer v. Bailey*, 69 L. T. 179.

(*f*) *Clements v. Welles*, L. R. 1 Eq. 200.

(*g*) *Jay v. Richardson*, 30 Beav. 563; *Altman v. Royal Aquarium Society*, 3 Ch. D. 228. See also *Kemp v. Bird*, 5 Ch. D. 974; *Holloway v. Hill* (1902), 2 Ch. 612; *Brigg v. Thornton* (1904), 1 Ch. 386; *Master v. Hansard*, 4 Ch. D. 718; and see C. A. in *Stuart v. Diplock*, 43 Ch. D. 343.

CHAPTER XXII.

RIGHTS OF WAY AND DRAINAGE, ETC., FOR BUILDING.

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SECT. I.—PRELIMINARY.

WHEN land is let or sold for building, questions frequently arise, (1) as to what rights are conferred upon the tenant or purchaser to lay down drains in order to connect his premises with the public sewers; (2) as to the rights of way which are conferred upon the tenant or purchaser. It is obvious that land for building purposes cannot be adequately enjoyed unless provision is made for drainage and convenient access.

SECT. II.—AGREEMENTS RELATING TO ROADS AND DRAINS.

(1) EXPRESS AGREEMENTS.

(a) *Roads made by Lessor.*—When land is appropriated and laid out for building purposes, the landowner, in some cases, forms and

Where roads,
etc., on the
building

estate are made by lessor.

makes all the roads and drains, with the object of opening up the land for the encouragement of building. Having done this, the lessor usually demises to the lessee the land and an equal moiety of the road, which the lessee covenants to repair; (a) and then a right of way is given to the lessee over the other moiety of the road, and also over all other neighbouring roads belonging to the lessor, together with a right of passage and running of water and soil through the main sewer or drain under the road. The lessor afterwards reserves a right of way over the moiety of the road demised, (b) and a right of passage of water and soil through all sewers or drains.

Reservation of right of way.

A reservation, in the strict sense of the term, can only be in respect of some right or profit issuing out of the subject of the demise, which had previously no separate existence, just as an exception must be parcel of the thing demised. A right of way, reserved to the lessor by the building lease, over the land demised, is not strictly an exception or a reservation, being neither parcel of the thing demised, nor issuing out of it, but is in strictness of law an easement newly created by way of regrant from the lessee. (c) If the grantor reserves an easement he cannot use it for any other purpose than the particular purpose for which it was originally granted; but if he reserves the land itself, he can use it in any way consistent with the rights of the public at large and of adjoining landowners. (d)

Reservations should be expressly mentioned in the building lease.

When land is let for building, the nature and extent of the easements, or quasi-easements, which the lessor intends to retain, should be expressly stated. The ordinary rule, that a grantor shall not derogate from his own grant, will prevail, if the right, to be reserved by implication, is not clearly essential to the enjoyment of the property retained. (e)

Extent of right over lessor's roads.

If the owner of a building estate grants to the lessees of the plots the right of passing over the roads made, or to be made, through the estate, in the same manner and as fully as if the same

(a) See *post*, p. 278, *et seq.*

(b) A private right of way is a mere easement over the soil of another, and not an interest in the land itself: *Godley v. Frith*, *Yelv.* 159; *Hewlins v. Shippam*, 5 B. & C. 221.

(c) *Durham and Sunderland Ry. Co. v. Walker*, 2 Q. B. 940; *Proud v. Bates*, 34 L. J. Ch. 406; *Dynevor v. Tennant*, 13 A. C. 279. See *Corp. of London v. Riggs*, 13 Ch. D. 798. As to implied reservations, see *Russell v. Watts*, 10 A. C. 590, cited *post*, p. 301.

(d) *Duke of Hamilton v. Graham*, L. R. 2 Sc. Ap. 166.

(e) *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355. See also as to an exception of the right to use a sewer, *Lee v. Stevenson*, E. B. & E. 512; and see *Rawstron v. Taylor*, 11 Exch. 369.

were public roads, that right will extend to the whole road, and not merely the "*via trita*," (*f*)

If a lessor covenants to make roads in accordance with a proposed building scheme, such a covenant may not be satisfied by merely making the roads over a certain part of the land which has been let; but the lessor may be compelled to make all the roads, if, from the construction of the covenant and the character of the proposed building scheme, it appears to have been so intended. (*g*)

Construction of covenant by lessor to make roadways, etc., under a building scheme.

(*h*) *Roads made by Lessee*.—If, on the other hand, the roads and drains have not been made by the lessor, the lessee generally covenants to lay and make all the pathways and roadways of the streets or portions of the streets forming part of the premises demised to him, according to such system as the lessor or his surveyor may direct; and also to make all sewers, drains, and channels upon such plans and systems as to join or coalesce with other sewers on the adjoining lands, and to permit the lessor to construct them at his expense, if he fail to do so. (*h*)

Covenant by lessee as to the making of roads.

(*c*) *Ways shown in Plans and Deeds*.—It is important to consider, in connection with rights of way, a matter which has already been referred to, (*i*) namely, what is the effect of plans which show roads, either made or intended to be made, annexed to conveyances or leases of land. If the land, where the road is represented, is the property of the vendor, and there is an express reference to the plan in the deed of conveyance, though the way might not be otherwise referred to, it seems probable that the deed and the plan together would operate as a grant of a right of way, or that the vendor would be estopped from denying the easement. But the mere exhibition on a plan of intended roads, where there is no reference to it in the conveyance, does not bind the lessor or vendor to make such roads. (*k*)

Grant of ways shown in plans.

Where, however, as before stated, in addition to the plan, roads

Where ways also men-

(*f*) *Nicol v. Beaumont*, 53 L. J. Ch. 853. See *Reg. v. United Kingdom Telegraph Co.*, 31 L. J. M. C. 166; and *Turner v. Ringwood Highway Bd.*, L. R. 9 Eq. 418.

(*g*) *Mason v. Cole*, 4 Ex. 375. See *Crisp v. Price*, 5 Taunt. 548; and see *Low v. Innes*, 4 De G. J. & S. 286; *Rouse v. London School Board*, 36 Ch. D. 619.

(*h*) See *post*, p. 409 n, as to a covenant by the lessor to insert in leases of other parts of the estate covenants that all other lessees shall bear part of the expenses of roads and sewers.

(*i*) See *ante*, p. 63, as to description by plans.

(*k*) See *ante*, p. 66. See *per* Pollock, C.B., in *Glave v. Harding*, 27 L. J. Ex. at p. 292, but it seems that the other judges did not entertain the same view.

tioned in
deed.

corresponding with those shown in the plan are mentioned in the deed of conveyance, though there may be no grant in terms, the deed and the plan together may operate as a grant of rights of way, even though there are no roads made as shown in the plan. (*l*)

SECT. III.—RIGHTS AND LIABILITIES IN RELATION TO ROADS AND DRAINS WHERE THERE IS NO EXPRESS AGREEMENT.

(1) PRESUMPTION AS TO SOIL OF ROAD WHERE THERE IS NO GRANT.

In the absence of a grant of a right of way, there is always a presumption that the soil of a road, *usque ad medium filum viæ*, belongs to the owners of the adjoining lands; which applies equally to a private as to a public road. (*m*) It was questioned, in the case of *Beckett v. Corporation of Leeds*, (*n*) whether such a presumption had any application to a street in a town. (*o*)

(2) CONTINUOUS AND APPARENT EASEMENTS.

On the grant by the owner of a part of his heritage, there will pass to the grantee all those continuous and apparent easements which have been, and are at the time of the grant, used by the owners of the entirety for the benefit of the parcel granted, (*p*) and it is immaterial whether the entirety, or the parcel granted, is then in the occupation of the owner or of a tenant. (*q*) As a

(*l*) *Espley v. Wilkes*, L. R. 7 Ex. 298. See also *Sumner v. Schofield*, 43 L. T. 763, as to estoppel; *Roberts v. Karr*, 1 Taunt. 495; *Harding v. Wilson*, 2 B. & C. 96. See also *Brett v. Clouser*, 5 C. P. D. 376; *Att.-Gen. v. Biphosphated Guano Co.*, 11 Ch. D. 327; *Furness Ry. Co. v. Cumberland, etc., Society*, 52 L. T. 144.

(*m*) *Holmes v. Bellingham*, 7 C. B. N. S. 329; *Smith v. Howden*, 14 C. B. N. S. 398.

(*n*) L. R. 7 Ch. 421.

(*o*) The law on the point is very clearly summed up in *Dwyer v. Rich* Ir. R. 6 C. L. 144, at p. 149. See also *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133, and cases there cited; *Pryor v. Petre*, [1894] 2 Ch. 11, where the presumption was rebutted.

(*p*) *Ewart v. Cochrane*, 4 Macq. 122; *Hall v. Lund*, 1 H. & C. 676; *Sheffield v. Brown*, 4 De G. J. & S. 185; *Pearson v. Spencer*, 1 B. & S. 571; *Polden v. Bastard*, L. R. 1 Q. B. 156; *Allen v. Taylor*, 16 Ch. D. 355; *Bayley v. G. Western Ry.*, 26 Ch. D. 434; *Russell v. Watts*, 10 A. C. 590.

(*q*) *Barnes v. Loach*, 4 Q. B. D. 494; and see *Addison, Torts* (7th ed.), 302; *Sheffield v. Brown*, 4 De G. J. & S. 185; *Wheeldon v. Burrows*, 12 Ch. D. 31, where *Pyer v. Carter*, 1 H. & N. 916, was dissented from, and *Sheffield v. Brown*, 4 De G. J. & S. 185; 10 Jur. N. S. 111, and *Swansborough v. Coventry*, 9 Bing. 305, were explained; *Francis v. Hayward*, 22 Ch. D. 177; *Watson v. Troughton*, 48 L. T. 508; *Worthington v. Gimson*, 2 E. & E. 618; *Pearson v. Spencer*, 1 B. & S. 571; *Glave v. Harding*, 27 L. J. Ex. 286; *Booth v. Alcock*, L. R. 8 Ch. 663. See *Russell v. Watts, post*, p. 301, as to the difference between implied grants and implied reservations.

general rule, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. (r)

The following are instances of continuous quasi-easements which have been held to pass: the use of an artificial watercourse (s) (but this right depends upon the character of the watercourse, and the circumstances under which it was created (t)), of a drain, (u) of a coalshoot and waterpipes, (w) of window lights and the like. A mere right of way is not such a continuous apparent easement as to pass without express words, but a particular formed way may pass without any words, although in some sense it is not an apparent and continuous easement; or rather may pass, because, being a formed road, it is considered to be a continuous and apparent easement, in cases where the surrounding facts point to that being the intention. (x)

Instances of continuous easements which have been held to pass.

The rule applies on a severance of an estate by will, and a right over a defined road will pass though not mentioned. (y)

(3) WAY OF NECESSITY.

Another exception to the rule, that a right of way does not pass without express words, arises where there is an absolute necessity, (z) and nothing less, when a right of way will be implied. (a)

(r) *Wheelton v. Burrows*, *supra*; *Russell v. Watts*, *supra*; *Taws v. Knowles*, [1891] 2 Q. B. 564.

(s) *Watts v. Kelson*, L. R. 6 Ch. 166. Distinguished in *Burrows v. Lang*, *infra*.

(t) *Greatrex v. Hayward*, 8 Ex. 291; *M'Evoy v. G. N. Ry. Co.* (1900), 2 I. R. 325, 333; *Burrows v. Lang* (1901), 2 Ch. 502.

(u) *Pyer v. Carter*, 1 H. & N. 916; *Hall v. Lund*, 1 H. & C. 767; but see as to this, *Wheelton v. Burrows*, 12 Ch. D. 31, *supra*.

(w) *Hinchcliffe v. Kinnoul*, 5 Bing. N. C. 1.

(x) *Brown v. Alabaster*, 37 Ch. D. 490; *Watts v. Kelson*, *supra*; *Pearson v. Spencer*, 3 B. & S. 761; *Thomas v. Owen*, 20 Q. B. D. 225. See, too, *Barlow v. Rhodes*, 1 Cr. & M. 448; *Wardle v. Brocklehurst*, 1 E. & E. 1058; 2 E. & E. 612; *Brett v. Clowser*, L. R. 5 C. P. D. 376. As to the effect of general words on the question of what passes, see *post*, p. 273; and see further, as to implied grants, Chap. XXIII., relating to implied grants of rights of light, the law on which subject is the same as with regard to other easements.

(y) *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761; *Barnes v. Louch*, 4 Q. B. D. 494; *Phillips v. Lowe*, [1892] 1 Ch. 47.

(z) An easement of necessity means an easement without which the property cannot be used at all, and not merely one necessary to the reasonable enjoyment of that property: *Ray v. Hazeldine* (1904), 2 Ch. 17. See also *Union Lighterage Co. v. London Graving Dock Co.* (1902), 2 Ch. 557.

(a) *Pinnington v. Galland*, 9 Exch. 1; *Pearson v. Spencer*, 3 B. & S. 761;

In cases of ways of necessity, the grantor has the right to point out the way, provided it is a convenient one, (b) and a person cannot have two ways of necessity. (c)

(4) IMPLIED RESERVATION OF EASEMENTS.

Although, as a general rule, there is no corresponding implication as to continuous easements in favour of the grantor, yet the law will usually presume a reservation in the conveyance of such an apparent easement over the part conveyed as is essential to the due enjoyment of the part retained, where there is nothing in the conveyance to negative the presumption. (d)

Implied reservation where there is notice of a building scheme.

But where a purchaser has notice (e) that the adjoining land is to be laid out in building, in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication, as a way of necessity. (f)

Gayford v. Moffatt, L. R. 4 Ch. Ap. 133; *MacNaghten v. Baird* (1903), 2 Ir. R. 731; *Buckby v. Coles*, 5 Taunt. 311. For other cases illustrating ways of necessity, see *Oldfield's Case*, Noy, 123; *Osborn v. Wise*, 7 C. & P. 761; *Roberts v. Karr*, 1 Taunt., at p. 498; *Davies v. Sear*, L. R. 7 Eq. 427; *Espley v. Wilkes*, L. R. 7 Ex. 298; *Holmes v. Goring*, and *Holmes v. Elliott*, 2 Bing. 76. *Gale* (7th ed.), 158; *Pheysey v. Vicary*, 16 M. & W. 484.

(b) *Bolton v. Bolton*, 11 Ch. D. 968; *Deacon v. S.-E. Ry.*, 61 L. T. 377.

(c) *Ib.*

(d) See *Wheeldon v. Burrows*, 12 Ch. D. 31; *Russell v. Watts*, 10 A. C. 590. See *Pinnington v. Galland*, 9 Ex. 1; *Pearson v. Spencer*, 1 B. & S. 571; *Richards v. Rose*, 9 Exch. 218; *Murchie v. Black*, 11 Jur. N. S. 608; *Ray v. Hazeldine* (1904), 2 Ch. 17, *supra*, and at p. 301, *post*; *Gayford v. Moffatt*, L. R. 4 Ch. Ap. 133, 135; Mr. Serjeant Williams' note to *Pomfret v. Ricraft*, 1 Wms. Saund. (ed. 1871), pp. 571-574. It seems that the same rule applies, if the grant is of the landlocked close, with an implied grant of a way of necessity over the surrounding land; *Corporation of London v. Riggs*, 13 Ch. D. 798. See *Watts v. Kelson*, L. R. 6 Ch. 166.

(e) See *ante*, p. 67, and p. 257, *et seq.*, as to the assignees with notice of restrictive covenants.

(f) *Davies v. Sear*, L. R. 7 Eq. 427; *Serff v. Acton L. Bd.*, 31 Ch. D. 679. As to effect of a conveyance of a gateway, see *Reilly v. Booth*, 44 Ch. D. 12. See *ante*, p. 63, *et seq.*, as to plans forming part of an agreement. See *Att.-Gen. v. Biphosphated, etc., Co.*, 11 Ch. D. 327. See *Suffield v. Brown*, 4 De G. J. & S. 185; 10 Jur. N. S. 111; *Ewart v. Cochrane*, 4 Macq. 117; *Morland v. Cook*, L. R. 6 Eq. 252; *Hall v. Lund*, 1 H. & C. 676; *Dodd v. Burchell*, 1 H. & C. 113. Easements are not affected by the London Building Act; *Wells v. Ody*, 1 M. & W. 452; *Titterton v. Conyers*, 5 Taunt. 465; *Crofts v. Haldane*, L. R. 2 Q. B. 194. For an instance of the danger of purchasing property, where the conveyance from a common vendor contains no express reservation, see *Watson v. Troughton*, 48 L. T. 508.

(5) EFFECT OF GENERAL WORDS.

If the easements are not continuous and apparent or of necessity, the grantor, in order to pass them, must either employ words of express grant, or must, prior to the Conveyancing Act, 1881, have described them as *used* and *enjoyed* with the land conveyed, or in similar terms. (g) A right of way would not, in general, pass as "an appurtenance," (h) though, as we have seen, a right over a particular formed road would pass. (i)

The word "appurtenances" is not an apt word for the creation of a new right, and the word "appurtenant" is not apt to describe a right which had never previously existed; but from as long ago as the fourth year of Philip and Mary the word "appurtenances" has easily admitted of a secondary meaning, and as equivalent in that case to "usually occupied." (k)

A purchaser is only entitled, in a contract for the sale of land "with the appurtenances," to have such general words in his conveyance as he would have been entitled to before the Conveyancing Act came into operation; and if the general words implied by sect. 6 of that Act are more extensive than the contract, the vendor is entitled to have them limited accordingly. (l)

Even where no easement existed before the unity of possession, but a right of way was subsequently used with one tenement over the other, a grant of the first-mentioned tenement, "together with all ways now *used* or *enjoyed therewith*," would pass the right of way. (m)

But it is now provided by the Conveyancing and Law of General Property Act, 1881, (n) that certain "general words" shall be deemed to be included in every conveyance. (o) The section applies only to conveyances made after the commencement of

(g) *James v. Plant*, 4 A. & E. 749; *Barlow v. Rhodes*, 1 Cr. & M. 448.

(h) *Worthington v. Gimson*, 2 E. & E. 618; *Clements v. Lambert*, 1 Taunt. 205; *Grymes v. Pawcek*, Bulstr. 17; *James v. Plant*, *supra*. See *Koozstra v. Lucas*, 5 B. & A. 839, as to the words "together with all ways appertaining, or with any parts thereof used or enjoyed;" and also *Harding v. Wilson*, 2 B. & C. 96, as to "all ways thereunto appertaining."

(i) *Ante*, p. 271. See also *Gogarty v. Hoskins* (1906), 1 Ir. R. 173.

(k) *Thomas v. Owen*, 20 Q. B. D. 225.

(l) *Re Peck and London School Board*, [1893] 2 Ch. 315.

(m) *Barkshire v. Grubb*, 18 C. D. 616; *Watts v. Kelson*, L. R. 6 Ch. 166; *Kay v. Orley*, L. R. 10 Q. B. 369; *Brown v. Alabaster*, 37 Ch. D. 490; *Bayley v. J. W. Ry. Co.*, 26 Ch. D. 434; *International Tea Stores Co. v. Hobbs* (1903), 2 Ch. 165. As to the use of the words "now or heretofore held or enjoyed," see *Roe v. Siddons*, 22 Q. B. D. 224.

(n) 44 & 45 Vict. c. 41, s. 6.

(o) Conveyance includes leases and assignments, *ib.* s. 2, subs. 5.

Permissive
and pre-
carious
enjoyments.

The right to
take water.

Extinguished
easements.

the Act, and so far as a contrary intention is not expressed; (*p*) and although there is no such thing known to the law as a precarious easement, (*q*) an enjoyment which is wholly permissive and precarious may pass under the general words implied by the Conveyancing Act. (*r*)

The right desired to be enjoyed must be one which is known to the law. A mere right to take water from a pond, if and whenever the defendant chose to put water into the pond, does not exist at law and could not be deemed to pass. It would be a precarious easement. (*s*)

It should, however, be observed that the words in sect. 3 of the Conveyancing Act, 1881, "*at the time of conveyance*," may still render an express grant necessary when the easement in question has been extinguished by unity of possession, since the Act does not seem to provide for the regranting of extinguished easements.

(6) RIGHT OF WAY BY PRESCRIPTION.

The Prescription Act, 1832, s. 2, (*t*) does not preclude rights of way from being claimed, and acquired, by prescription at common law. (*u*)

(*p*) As to contrary intention, see *Beddington v. Attlee*, 35 Ch. D. 317; *Birmingham, Dudley, etc., Bank v. Ross*, 38 Ch. D. 295, followed in *Burrows v. Lang* (1901), 2 Ch. 502.

(*q*) *Burrows v. Lang* (1901), 2 Ch. 502.

(*r*) *International Tea Stores v. Hobbs* (1903), 2 Ch. 165, and *supra*. The question as to whether the plaintiffs were using the road in question in that case under licence was held to be immaterial, the true issue being "was the way in fact enjoyed at the date of the conveyance?"

(*s*) See *per* Farwell, J., *ib.*, at pp. 171, 172 in the L. R.

(*t*) 2 & 3 Will. IV. c. 71, s. 2: "No claim which may be lawfully made at the common law by custom, prescription, or grant to any way or other easement . . . to be enjoyed or derived upon, over, or from any land . . . , when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." For instances of a claim being defeated, see *Bright v. Walker*, 1 Cr. M. & R. 219; *Kinloch v. Neville*, 6 M. & W. 806; *Tickle v. Brown*, 4 A. & E. 383; *Gardner v. Hodgson's Brewery Co.* (1901), 2 Ch. 198; *Beasley v. Clarke*, 2 Bing. N. C. 705. As to deducting period of a tenancy for life or years, where claim resisted by reversioner, see s. 8; a remainderman is not a reversioner within this section. *Symons v. Leaker*, 15 Q. B. D. 629.

(*u*) *Holford v. Hankinson*, 5 Q. B. 584; *Aynesley v. Glover*, L. R. 10 Ch. 283, and p. 233.

Any occurrence, during either the shorter or longer period, inconsistent with the *continuous* enjoyment of the easement, claimed as an easement and as of right, is fatal to a claim under the above section, as, for instance, unity of possession at any part of the period, (w) or permission asked at any time during the period; (x) or an agreement made at any time within the period, (y) or any other fact showing that at any time during the period the enjoyment could not then have been as of right. (z)

Where licence or permission to use a way across a yard was given by parol more than forty years before action brought, and where such licence was not gratuitous, but subject to the payment of a small annual sum at the end of each year, it was held that the proper inference to be drawn from the annual payment was that it was a payment for a licence for the user of the way during the preceding year, and that such payment was sufficient to negative an enjoyment of the way by the plaintiff and her predecessors as of right for the full period of forty years under sects. 2 and 5 of the Prescription Act. (a)

SECT. IV.—EXTENT OF USER OF WAYS.

Where a right has been granted by deed, the extent of the right is determined by the construction of the deed. (b)

Where there is an express grant of a right of way to a particular place, the grant is not to be impliedly restricted to access to the land for purposes for which access was required at the date of the grant; but a right of way appurtenant to one close cannot be used for access to another close not part and parcel of it. (c)

Where the right has been acquired by prescription, the extent of it must be determined by the accustomed user. (d) And if, from the extent of user having been gradually and imperceptibly

(w) *Onley v. Gardiner*, 4 M. & W. 499; *Damper v. Bassett* (1901), 2 Ch. 350. See *Outram v. Maule*, 17 Ch. D. 394.

(x) *Monmouth Canal Co. v. Harford*, 1 Cr. M. & R. 614; *Beasley v. Clarke*, 2 Bing. N. C. 705.

(y) *Per Cur.* in *Tickle v. Brown*, 4 A. & E. 383.

(z) *Warburton v. Parke*, 2 H. & N. 64; *Gavel v. Martyn*, 19 C. B. N. S. 732; *Outram v. Maule*, *supra*. See *Hollins v. Verney*, 13 Q. B. D. 304, where road was occasionally stopped up. Cf. *Ludyan v. Grace*, L. R. 6 Ch. Ap. p. 763.

(a) *Gardner v. Hodgson's Brewery Co.* (1901), 2 Ch. 198.

(b) *Cannon v. Villars*, 8 Ch. D. 415.

(c) *Harris v. Flower*, 74 L. J. Ch. 127.

(d) *United Land Co. v. G. E. Ry. Co.*, L. R. 10 Ch. 586; *Wimbledon, etc., Conservators v. Dixon*, 1 C. D. 362; *Brulburn v. Morris*, 3 Ch. D. 812; *Finch v. G. W. Ry. Co.*, 5 Ex. D. 258.

increased, it is impossible to measure definitely the extent of the user at the period of its commencement, no easement can be acquired. (e)

Extent of enjoyment of roads, etc.

A person having a right to an easement may, as a general rule, use it in such manner as is necessary for its commodious enjoyment. But the immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property, where that would impose a greater burden on the servient tenement. (f) Where there is no limit in grant of a right of way, it may be used for all purposes. The grantee of a right of road may lay a flagstone down in front of his house, if necessary for his enjoyment of his right, and no obstruction to the road is thereby caused. (g)

Illustrative cases.

If premises are demised or conveyed "with a right of way thereto," it may be a question for a jury what is a reasonable use of such right. (h) A grantee of a right of way "in, through, and along" a particular way is not justified in making a transverse road across the same. (i) A public road differs from a private road in this: "You may make an opening in your fence and go into it at any part of the length of the public road or at the end; but in a private road you must go in at the usual and accustomed part." (k) And this is so, as to a public road, whether the person claiming the right is the presumptive owner of the soil of the highway or not. (l)

How far ways can be used for building purposes, etc.

Upon this principle, where a road to a farm has been immemorially used, not only for ordinary agricultural purposes, but, in certain instances, for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm, and for carting away sand dug out of the farm, such user does not establish a right of way for carting materials for building a number of new houses on the land. (m)

(e) *Goldsmid v. Tonbridge Wells, etc., Commissioners*, L. R. 1 Ch. 349.

(f) *Wimbledon, etc., Conservators v. Dixon*, 1 C. D. 262.

(g) *Gerrard v. Cooke*, 2 B. & P. N. R. 115.

(h) *Hawkins v. Carbines*, 27 L. J. Ex. 44; *Skull v. Glennister*, 16 C. B. N. S. 81; *Williams v. James*, L. R. 2 C. P. 577; *Harris v. Flower*, *supra*.

(i) *Senhouse v. Christian*, 1 T. R. 560.

(k) *Woodyer v. Hadden*, *per* Chambre, J., 5 Taunt. at p. 132; *Berridge v. Ward*, 2 F. & F. 208; *Marshall v. Ulleswater Steam Co.*, L. R. 7 Q. B. 166.

(l) *Ramuz v. Southend L. Bd.*, 67 L. T. 169; *Lyon v. Fishmongers' Company*, 1 A. C. 662.

(m) *Wimbledon, etc., Conservators v. Dixon*, 1 C. D. 362. See also *United Land Co. v. G. E. Ry. Co.*, L. R. 17 Eq. 158; L. R. 10 Ch. Ap. 586. See *Corporation of London v. Riggs*, 13 Ch. D. 798; *Newcomen v. Culson*, 5 Ch. D.

The dominant owner can only use a right of way which is appurtenant to his tenement for the purpose of passing to and from that tenement. (n) He cannot, therefore, make a mere colourable use of the dominant tenement; for instance, he cannot, in order to get the benefit of the right of way for carrying building materials to ground adjoining the dominant tenement, on which he is building a number of cottages, carry them first to the land to which the right of way was appurtenant, and, having deposited them there, subsequently move them to the land on which he is building. (o)

Right can only be used for going to the dominant tenement.

The right of the owner of the dominant tenement must not be exercised in a manner which will produce unnecessary inconvenience, or injury, to the owner of the servient tenement; (p) and such right cannot be extended so as to increase the burden or restriction placed by it on the servient tenement. (q)

No unnecessary injury to servient tenement.

When it is intended to erect additional buildings beyond those standing at the time of the demise, care should be taken to see that the rights granted are sufficiently extensive. Where land and buildings were demised together with the free passage of water and soil to a cesspool, the easement was restricted to a reasonable use for the purposes of the premises, in the condition in which they were at the time of the demise, and was not extended to buildings subsequently erected. (r)

Care necessary where additional buildings are to be erected.

SECT. V.—REMEDIES FOR DISTURBANCE OR EXCESSIVE USER.

If there is a disturbance in the enjoyment of an easement, the owner of the dominant tenement may either proceed at law, or, Disturbance.

133. As to the right to lay gas pipes, see *Selby v. Crystal Palace District Gas Co.*, 30 Beav. 606. See the cases there cited as to the dedication of roads to the public, and also a covenant for the use of an occupation road. See *Wood v. Stourbridge Ry. Co.*, 16 C. B. N. S. 222.

(n) *Ackroyd v. Smith*, 10 C. B. 161.

(o) *Skull v. Glennister*, 16 C. B. N. S. 81; *Williams v. James*, L. R. 2 C. P. 577. See *Harris v. Flower & Son*, *supra*.

(p) *Gerrard v. Cooke*, 2 B. & P. N. R. 115.

(q) See *Greenlade v. Halliday*, 6 Bing. 379; *Chadwick v. Marsten*, L. R. 2 Ex. 285. See *Midgley v. Richardson*, 14 M. & W. 595; *Hedley v. Fenwick*, 3 H. & C. 349. See *Gale on Easements* (7th ed. 1902), p. 471. As to the duty and liability of owners of adjoining premises with respect to drainage from the respective premises, see *Humphreys v. Cousins*, 2 C. P. D. 239.

(r) *Wood v. Saunders*, L. R. 10 Ch. 582. See *Williams v. James*, L. R. 2 C. P. 577, 582; *Finlinson v. Porter*, L. R. 10 Q. B. 188; *Collins v. Slade*, 23 W. R. 199; *United Land Co. v. G. E. Ry. Co.*, L. R. 17 Eq. 158, 162; L. R. 10 Ch. 586; and also *Henning v. Burnet*, 8 Exch. 187; *The South Metropolitan Co. v. Eden*, 16 C. B. 57; *New Windsor v. Storell*, 27 Ch. D. 665; *Metropolitan Rd. v. L. & N.-W. Ry. Co.*, 17 Ch. D. 246.

after notice and request to remove the obstruction, and without doing more damage than is necessary for that purpose, pull it down, although inhabited. (s)

Excessive user.

If, on the other hand, the owner of an easement exceeds his rightful enjoyment, or does anything which would, after long user, produce an increased right, the servient owner may in all cases obstruct or prevent the excessive enjoyment, or the user of the thing, which would enable the dominant owner after a time to claim an increased right. (t)

Damages and injunction.

Under the Judicature Acts, proceedings may now be taken, in an action in any division of the High Court of Justice, for a disturbance of an easement, for damages either in addition to, or in substitution for, an injunction. (u) A mandatory injunction may also be granted, that is, an order directing the removal of a building, so far as it improperly obstructs a right of way. (v)

Action by lessee.

A lessee claiming a right of way, as to which there is a dispute, may take proceedings for relief against the other party laying claim to such right of way, and also against the lessor; asking in the alternative, if the right be established in favour of the other party, an indemnity and damages against the lessor under his covenant for quiet enjoyment. (w)

Right of reversioner for obstruction of way.

Where the obstruction of a way is of a permanent character, or calculated to call the right of a reversioner in question, he, as well as the occupier, will have a right of action. (x) As a rule, however, the act is one which causes injury to the occupier alone. (y)

SECT. VI.—REPAIRING ROADS AND DRAINS.

(1) GENERALLY.

Where there is an easement.

The liability for the repair of roads and drains in the case of highways will be dealt with later on in this chapter. (z) In the

(s) *Davis v. Williams*, 16 Q. B. 546; *Wigford v. Gill*, Cro. Eliz. 269; *Perry v. Fitzhove*, 8 Q. B. 757; *Lane v. Capsey*, [1891] 3 Ch. 411, where the persons claiming the right had failed to obtain a mandatory injunction.

(t) *Greenslade v. Halliday*, 6 Bing. 379; *Goddard on Easements* (3rd ed.), p. 372. As to cases on the same principle applied to rights to light, see p. 293.

(u) See *ante*, p. 197, *et seq.*, as to specific performance, or an injunction, and damages. See *ante*, p. 244, *et seq.*, as to when relief will be given by injunction, etc. See *Goodhart v. Hyett*, 25 Ch. D. 182, and *infra*, p. 279.

(v) See Chap. XX., Sect. II., as to mandatory injunctions, and cases there cited. See *Krehl v. Burrell*, 11 Ch. D. 146.

(w) *Child v. Stenning*, 7 Ch. D. 413; 11 Ch. D. 82.

(x) *Bell v. Midland Ry. Co.*, 10 C. B. N. S. 287; *Kidgill v. Moor*, 9 C. B. 364.

(y) *Mott v. Shoolbred*, L. R. 20 Eq. 22.

(z) See p. 280, *et seq.*, sub-tit. "Dedication of Highways."

case of easements the law is clear that the dominant owner may enter the servient tenement, and do the necessary repairs, and that the servient owner is under no obligation to do them. (a) And where an easement exists, giving the owner of a house a right to bring water to his house through pipes under adjoining land, the owner has the right to enter the adjoining land to repair the pipes, and can restrain the defendant from committing any act which would occasion greater difficulty or expense in the exercise of such rights, or which, if acquiesced in, might in the future materially affect those rights. (b)

Right of dominant owner to enter.

(2) COVENANTS IN LEASES AS TO REPAIR OF ROADS, DRAINS, ETC.

A properly framed building lease will contain a covenant by the lessee, either to maintain, during the term, in good condition and repair, the roadways, sewers, and drains when made, or to pay a reasonable proportion of the expense of repairing and cleansing them, and also such other easements as are to be used in common by the occupiers of the demised premises, and the occupiers of any other buildings to be erected on any part of the estate of the lessor; and it is usually stipulated that the proportion should be ascertained by the architect or surveyor for the time being of the lessor. (c) It is, when necessary, provided that if the road, a moiety of which is, as before stated, usually demised with the building land, and the sewer and drains under the same, shall be adopted wholly, or partially, by the parish or public as a public road, sewer, and drain, the obligation under the covenant to repair shall cease to the extent to which the road, sewer, and drain may be adopted by the parish or public.

Covenant in building lease to repair roads and drains, etc.,

—until repairable as public roads, etc.

When land is sold in building plots, and the roads have not been made, or, if made, are not repairable as public roads, a deed is, in some cases, made between the vendor and trustees on the part of the several purchasers, by which a certain part of the land is conveyed to the trustees, with the various necessary powers as to the formation and maintenance of roads for the use and benefit of

Deed with trustees for maintenance of roads on sale of building plots.

(a) *Pomfret v. Ricraft*, 1 Wms. Saund. at p. 565, and see p. 269; *Hamilton v. St. George's Vestry*, L. R. 9 Q. B. 42; *Gerrard v. Cooke*, 2 B. & P. N. C. 109; *Colebeck v. Girdlers' Company*, 1 Q. B. D. 234; *Neurcomen v. Coulson*, 5 Ch. D. 133.

(b) *Goodhart v. Hyett*, 25 Ch. D. 182, and see the cases there cited; *Mayor of Birkenhead v. L. & N.-W. Ry. Co.*, 15 Q. B. D. 572.

(c) See F. XXVII., p. 429. As to a covenant by lessor to repair drains, etc., not extending to structural alterations, and as to notice necessary of defects, see *Huggall v. McKean*, 1 Cab. & El. 391; *Scott v. Brown*, 69 J. P. 89. For a clause in a lease under a power, see F. XXIX., p. 440.

Agreement
between
owners of
several
houses.

the purchasers and the owners for the time being of parts of the estate. (*d*) Where there are only a few houses, as in the case of houses forming a small terrace, the deed, providing for the making and maintaining of certain land as a private carriage road and footway, is usually entered into between the respective owners of the houses themselves. (*e*)

SECT. VII.—DEDICATION OF HIGHWAY.

What
amounts to
a dedication.

A highway, other than a statutable highway, must be dedicated to the public by the owner of the soil; that is, he must have done some act, or conducted himself in some manner, showing an intention to give the public an irrevocable licence to travel along it at their free will and pleasure. (*f*)

Results of
dedication.

Dedication does not involve the dedicating landowner in any liability to the public to keep the road dedicated in repair. At common law, before the Highway Act, 1835, dedication followed by acceptance by the public, as, for instance, by user, imposed upon the parish liability to keep the road in repair. (*g*) But as to roads dedicated since 1835, in order to impose the obligation of repair upon the public authorities, the road must have been taken over with the formalities prescribed by that Act. (*h*) When no express dedication can be shown, uninterrupted user of a way by the public for a sufficient length of time, is, in the absence of explanatory evidence, conclusive proof of an accepted and valid grant of highway. (*i*)

Uninter-
rupted user.

So where certain paths had been used by the public from the earliest memory of a witness aged 87 down to 1894, with the knowledge and consent of the owner, it was held that the evidence of dedication was irresistible; (*j*) but where a path was used for

(*d*) For a precedent of such a deed, see *Davidson*, vol. ii. pt. 1 (4th ed.), 530.

(*e*) For a precedent of an agreement of this description, see *Davidson*, vol. ii. pt. 1 (4th ed.), 137.

(*f*) See *Steer's Parish Law* (5th ed. 1899), 290; *Poole v. Huskinson*, 11 M. & W. 827; *Surrey Canal Co. v. Hall*, 1 M. & G. 392. See *Selby v. Crystal Palace District Gas Co.*, 30 Beav. 606; *Reg. v. Lordsmere*, 19 L. J. M. C. 219; *Healey v. Mayor of Batley*, L. R. 19 Eq. 375.

(*g*) *R. v. Leake*, 5 B. & Ad. 469.

(*h*) *Post*, p. 282.

(*i*) See *per* Lord Kenyon, *Rugby v. Merryweather*, 11 East, 375 n.; *Reg. v. Petrie*, 4 E. & B. 737; *Reg. v. East Mark*, 11 Q. B. 877; *Illingworth v. Montgomery*, 2 L. T. N. S. 726. As to the construction of sewers and acquiescence of owners of land, see *Birkenhead (Mayor, etc.) v. London & N.-W. Ry. Co.*, 49 J. P. 135.

(*j*) *Leckhampton v. Ballinger and the Cheltenham R. D. Co.*, 68 J. P. 464.

forty years by persons when working at certain quarries, but not at other times, it was held that no public right of way was established. (k)

If a person has a private right of way, his right is not necessarily, and in every case, extinguished if the public gains a right to use the same road, and the owner of the private right may, at any time, assert and rely upon that right to justify his user of the way without resorting to the public right. (l) Private right not necessarily extinguished by public right.

A *cul-de-sac* may be a highway. This is so in a street in a town into which houses open, and which is repaired, sewered, and lighted by the public authority at the expense of the public, but it seems that is not the case in the country where public money has not been expended on the site in question. (m) The question appears to be one of fact. (n) Cul-de-sac.

A dedication will be presumed if a person form a street on his own land, and fail to erect any bar or other impediment, and it is used as a highway by the public. (o) But where a person in 1865 laid out a proposed road across part of some land, and built houses on one side of the road, but in 1870 abandoned the intention of making the road, and in 1874 demised the remainder of the land, including the site of the abandoned road, it was held that the laying out of the proposed road was no dedication of a public right of way. (p) Dedication presumed if no bar erected to new road.

The dedication must, in general, be by the owner of the fee; and a tenant for life, (q) a leaseholder, however long his term, or a person having only a limited estate, cannot devote any portion of the land to a highway, so as to bind the reversioner. (r) Who must dedicate, and for what purpose.

A dedication may be for a restricted purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public, as a particular parish. Such a partial dedication is simply void, and operates as no dedication at all. (s) Restricted dedication.

(k) *Ib.*

(l) *Allen v. Ormond*, 8 East, 3; *Reg. v. Chorley*, 12 Q. B. 515; *Duncan v. Louch*, 6 Q. B. 915. See *Chichester v. Lethbridge*, Willes, 71.

(m) *Young v. Culbertson*, 1 Macq. 456; *Hourke v. Davis*, 44 Ch. D. 110; *Att.-Gen. v. Richmond Corporation*, 68 J. P. 73.

(n) *Att.-Gen. v. Richmond Corporation*, *supra*; and see *Whitehouse v. Hugh* (1906), 2 Ch. 283.

(o) *Lade v. Shepherd*, 2 Str. 1094; *Ree v. Lloyd*, 1 Camp. 260. See *Woollyer v. Halden*, 5 Taunt. 125, as to a bar, etc., being kept across the road.

(p) *Hall v. Bootle Corporation*, 29 W. R. 862.

(q) *Eyre v. New Forest Highway Bd.*, 56 J. P. 517.

(r) *Wood v. Feal*, 5 B. & All. 454; *Ree v. Barr*, 4 Camp. 16.

(s) *Steer's Parish Law* (4th ed.), 212; *Pratt on Highways* (15th ed.), p. 15; *Poole v. Huskinson*, 11 M. & W. 827.

The grantor, however, may make his grant subject to any reservation, or condition, not absolutely inconsistent with the right of way. Thus he may reserve such rights as to maintain gates or stiles across it, (t) cellar flaps, coalshoots, or steps in it. (u)

Owners cannot afterwards be called upon to repair.

If a street has once been decided to be repairable by the inhabitants at large, and that decision has been acquiesced in, it is conclusive, and the adjoining owners cannot afterwards be called upon to pay for the repairs. (w)

And it has been decided in a case (x) which arose under the Private Street Works Act, 1892, (y) that a determination by the Court under that Act that a street is a highway, repairable by the inhabitants at large, is a judgment *in rem*, and conclusive as to the status of the street.

If highway not repairable by inhabitants, owners must defray expenses.

As the expense of repairing a highway, repairable by the inhabitants at large, cannot be charged to individuals, so, on the other hand, in the case of a highway not repairable by the inhabitants at large, the local authorities have no power to defray the cost of surveying, levelling, paving, etc., out of the general rates, but must call upon the owners of the adjoining premises to do such works as are required. (z)

Owner's rights run with land.

The rights and liabilities of the grantor, as to the road dedicated, run with the land, and (in the absence of proof to the contrary) are presumed to vest in the owners of the fee of the adjoining land on either side, each of whom is owner of the soil of the highway, *usque ad medium filum vicæ*. *Quâ* the public, however, these rights and liabilities are vested in and attached to the occupiers of such adjoining lands. (a)

SECT. VIII.—ADOPTION OF HIGHWAY BY PARISH.

Adoption by the parish.

By the Highway Act, 1835, (b) s. 23, where any landowner proposes to dedicate a highway to the use of the public, and is desirous that the same should be a repairable highway, the

(t) See *James v. Hayward*, Cro. Car. 184.

(u) *Fisher v. Prowse*, 2 B. & S. 770; *Pratt on Highways* (15th ed.), p. 17. As to canal towpath, see *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273.

(w) See *Reg. v. Hutchins*, 6 Q. B. D. 300; *Reg. v. Inhabitants of Bradfield*, L. R. 9 Q. B. 552; *R. v. Lordsmere*, 19 L. J. M. C. 219.

(x) *Wakefield v. Cooke* (1904), A. C. 31.

(y) 55 & 56 Vict. c. 57.

(z) *Dryden v. Overseers of Putney*, 1 Ex. D. 223; *Att.-Gen. v. Wandsworth District Bd. of W.*, 6 Ch. D. 539. See the provisions of the Metropolis Local Management Acts, and the Public Health Act, 1875, *infra*, and *post*, Part III.

(a) *Spearman's Highways*, 48.

(b) 5 & 6 Will. IV. c. 50.

following conditions are in the first place necessary: (1) He must give three months' previous notice in writing to the highway authority of such intention. (2) If the highway authority deem such proposed highway not to be of sufficient utility, the question is to be heard and determined before a Court of Summary Jurisdiction. (3) Notice must be given to the highway authority, by the landowner, to inspect such highway, and to two justices to view and certify at his expense that it has been made in a substantial manner, and of the width required by the Act. (c) (4) After the highway shall have been used by the public, and kept in repair by the landowner for twelve months, it will become a repairable highway. (d)

SECT. IX.—RIGHT TO DISCHARGE WATER FROM HOUSES.

Every one is bound, in building, so to construct his house as not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw the rainwater upon the neighbouring land. (c) But allowing rainwater to run across a highway from the eaves of a building is not "wilfully obstructing the highway." (f)

But a right may be acquired, by user, to compel the owner of the adjoining property to receive all the water dropping from the roof of a house. (g) Such a right appears to have been recognised by ancient decisions. (h) But a right to discharge water by drops

(c) Such certificate is to be enrolled at the quarter sessions holden next after the granting thereof.

(d) This section applies only to roads which had not been completely dedicated when the Act passed: *Reg. v. Westmark*, 2 M. & Rob. 305. See s. 36 as to where the vestry, etc., is desirous that any drift-way, carriage-way, or occupation road should become a repairable highway. See notes to this section in *Pratt on Highways* (15th ed.), p. 167, *et seq.* See also Highway Act, 1862, 25 & 26 Vict. c. 61; Highway Act, 1864, 27 & 28 Vict. c. 101; and 41 & 42 Vict. c. 77, as to parish highways.

(e) Com. Dig. Action on the case for a nuisance, A.

(f) *Croastill v. Rudcliffe*, 5 L. T. 834.

(g) *Lady Brown's Case*, cited in *Sury v. Pigott*, Palmer, 446; *Baten's Case*, 9 Rep. 53 b.; *Fay v. Prentice*, 1 C. B. 828. See also *Pyer v. Carter*, 1 H. & N. 922; *Harrop v. Hurst*, L. R. 4 Ex. 43; *Watts v. Kelson*, L. R. 6 Ch. 166; *Jones v. Peskett*, 1 M. & S. 234; *Battishall v. Reed*, 18 C. B. 696; *Harvey v. Waters*, L. R. 8 Ch. 162.

(h) In Roll. Abr. "Nuisance," G. 5, citing 18 Edw. 3, 22 b., it is said, "If a man hath a sue, that is to say, a spout, above his house, by which the water used to fall from his house, and another levieth a house paramount the spout, so that the water cannot fall as it was wont, but falls upon the walls of the house, by which the timber of the house perishes, this is a nuisance." Vin. Abr. "Nuisance," G. 5. Two similar classes of easements are recognised by the Civil Law, I. L. 1, ff. de serv. prael. as *servitus projiciendi* and *servitus stillicidii et fluminis recipiendi*.

Duty of person building.

Right by prescription.

upon the land of another does not create a right to collect the water in a spout or gutter, and to discharge it, in a single stream, over the land. (*i*)

Extinction
of such an
easement.

A right of this description will not be destroyed by heightening, or in any other way altering, the house from which the water falls, so long as the burden upon the servient tenement is not increased. (*k*) But where two freehold tenements become completely united in the same owner, he may modify the previous relative position of the different parts at his pleasure, and if he change the direction of a spout which emptied the rainwater of one house on the adjoining one, by so doing, he destroys the easement for ever. (*l*)

Easement to
affix sign.

It may be here mentioned that one can have an easement consisting of the right to affix a signboard to the servient tenement. (*m*)

SECT. X.—LICENCES.

A mere permission to do an act, which would without permission constitute a trespass, is a licence. Licences are revocable at the will of the grantor, for no interest in land is conferred on the grantee by the grant of a licence; but it has been said that reasonable notice of revocation should be given, especially if it is necessary for the licensee to do something, as to alter the direction of pipes or bell wires. (*n*) That which is called a licence, however, is often something more than a licence; it frequently comprises, or is connected with, a grant; and then the party who has given it cannot, in general, revoke it so as to defeat his grant to which it was incident. A licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol, but not otherwise. (*o*)

Executing
expensive
works.

If the licensee, acting upon the permission granted, has executed work of a permanent and expensive character, the licence is also irrevocable. (*p*)

(*i*) *Reynolds v. Clarke*, 2 Lord Raym. 1399.

(*k*) *Thomas v. Thomas*, 2 C. M. & R. 34; *Thackeray v. Wood*, 34 L. J. Q. B. 226.

(*l*) 11 Henry VII. f. 25; *Lady Brown's Case*, *supra*.

(*m*) *Moody v. Stiggles*, 12 Ch. D. 261.

(*n*) *Mellor v. Watkins*, L. R. 9 Q. B. 400.

(*o*) *Per Cur.* in *Wood v. Leadbitter*, 13 M. & W. at p. 844. In this case the subject of licences received much consideration. See *Newmarsh v. Brandling*, 3 Swan. 99.

(*p*) *Winter v. Brockwell*, 8 East, 308; *Wallis v. Harrison*, 4 M. & W. 538;

A licence which is not irrevocable may be revoked by any act of the grantor putting it out of his power to continue the permission, as, for instance, locking a gate across the way. (q) A mere parol licence to enjoy an easement on the land of another does not bind the grantor after he has transferred his interest and possession in the land to a third person, and it is not necessary to give notice of the transfer of the land in order to terminate the licence. (r)

Nevertheless, the right of a licensor to revoke a licence granted by him may co-exist with the right of the licensee to maintain an action against the licensor for breach of contract committed by him in revoking the licence. (s)

Acts operating as revocation.

Licensee's action for breach of contract.

Rochdale Canal Co. v. King, 2 Sim. N. S. 78; 20 L. J. Ch. 675; 16 Beav. 630; 22 L. J. Ch. 604; *Duke of Devonshire v. Elgin*, 14 Beav. 530; *Laird v. Birkenhead Ry. Co.*, Joh. 500; *Hervey v. Smith*, 22 Beav. 299; *Mold v. Wheatcroft*, 27 Beav. 510; *Bankart v. Tenant*, L. R. 10 Eq. 141.

(q) *Hyde v. Graham*, 1 H. & C. 593.

(r) *Wallis v. Harrison*, *supra*.

(s) *Kerrison v. Smith*, 66 L. J. Q. B. 762.

CHAPTER XXIII.

LIGHT AND AIR.

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SECT. I.—PRELIMINARY.

AN easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement has over another, existing in respect of their several tenements, by which the servient owner is obliged "*to suffer or not to do*" something on his own land, for the advantage of the dominant owner. (a) A right to light and air, either by prescription or otherwise, is an easement. But it should be observed that there is a distinction between the acquisition of a right to light by prescription and a right to air, for the former is regulated entirely by the Prescription Act, 1832, (b) but the latter can only become a prescriptive right by virtue of the common law. (c)

SECT. II.—AIR.

The cases on this subject have, as a general rule, been decided with reference solely to the interference with the access of light. But, in a recent case, damages were given, on the ground of implied covenant, in respect of an obstruction of access of air to a slaughterhouse which had been used for upwards of thirty years. (d) But a right, by way of easement, to the uninterrupted access of air, not coming by any definite channel, but over the general unlimited surface of the alleged servient tenement, cannot be acquired under the Prescription Act, sect. 2, by mere enjoyment for the statutory period, (e) and if claimed at common law it could only be on the ground of express or implied covenant not to interfere with access of air. (f)

Under the doctrine of derogation from grant, a grantor of land, to be used for a particular purpose, is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made, *e.g.* obstructing the

Access of air.

Interference by grantor with access of air.

(a) *Gale on Easements*, (7th ed., 1899), p. 6.

(b) 2 & 3 Wm. IV. c. 71, s. 3.

(c) As to the difference between the rights of light and air, see 2 Roll. Abr. 141 "Nuisance," G. pl. 16; Winch. 3; Godbolt, 189, 221; *Webb v. Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841; *Gale v. Abbot*, 8 Jur. N. S. 987; *Carriers' Co. v. Corbett*, 11 Jur. N. S. 719; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238. And see *Bryant v. Lefevre*, 4 C. P. D. 172. Cf. *Hall v. Lichfield Brewery Co.*, 49 L. J. Ch. 655.

(d) *Hall v. Lichfield Brewery Co.*, 49 L. J. Ch. 655. And see *Bass v. Gregory*, 25 Q. B. D. 481, where an injunction was granted.

(e) *Harris v. De Pinna*, 33 Ch. D. 238; *Aldin v. Latimer, Clark & Co.*, [1894] 2 Ch. 437. See generally as to right to access of air, *Chastry v. Ackland*, [1895] 2 Ch. 389.

(f) *Ib.*

access of air to land demised for the express purpose of carrying on the business of a timber merchant. (*g*)

Ventilation
of buildings.

The right to a free flow of air to a building being admitted as an easement recognised by law, there can be no doubt but that the converse right, that is to say, that the air in a building should be allowed to escape through or over an adjoining property for the purpose of ventilation, must also be recognised as an easement. (*h*)

SECT. III.—NATURE OF THE RIGHT TO LIGHT.

(1) MUST BE APPURTENANT TO BUILDING.

No easement of light can be claimed except as appurtenant to buildings, whether in town or country. (*i*)

Meaning of
"building."

A right to light cannot be claimed by twenty years' user in respect of a sawpit. (*k*) And a permanent structure, used for storing and seasoning timber, was held not to be a building within the Prescription Act. (*l*) A greenhouse, however, is a building within that Act. (*m*)

(2) THERE MUST BE AN APERTURE.

Skylights.

To found a claim to light, there must be an aperture in a building, opened there on purpose to admit light; (*n*) and except as to the incidence of light, there is no difference, in principle or in fact, between skylights and windows of any other character. (*o*)

Arch under
railway.

It has been held that a person was entitled to the light which came through an arch under a railway. (*p*)

(3) OBSTRUCTING LIGHT TO PREVENT RIGHT.

Right of
owners as to
opening new
windows.

If a householder opens new windows, overlooking the adjoining landowner's ground, the latter can obtain no relief, for it is the

(*g*) *Aldin v. Latimer, Clark & Co.*, [1894] 2 Ch. 437, *supra*. See also *Betts v. Pickfords*, 22 T. L. R. 315, p. 254, *post*.

(*h*) Goddard (6th ed.), p. 48; *Bass v. Gregory*, 25 Q. B. D. 481.

(*i*) *Yates v. Jack*, L. R. 1 Ch. 295; *Dent v. Auction Mart Co.*, L. R. Eq. 238; *Martin v. Headon*, L. R. 2 Eq. 425; *Kelk v. Pearson*, L. R. 6 Ch. 809.

(*k*) *Roberts v. Macord*, Moo. & Rob. 230; *Potts v. Smith*, L. R. 6 Eq. 311.

(*l*) *Harris v. De Pinna*, 33 Ch. D. 238.

(*m*) *Clifford v. Holt* (1899), 1 Ch. 698.

(*n*) *Garritt v. Sharp*, 3 A. & E. 325; *Harris v. De Pinna*, 33 Ch. D. 238. And see *Scott v. Pape*, 31 Ch. D. 554, and other cases cited, *post*, p. 294, as to alteration of the building.

(*o*) *Harris v. Kinloch*, W. N. 1895, p. 60. See also as to skylights, *Parker v. Stanley & Co.*, 50 W. R. 282.

(*p*) *Myers v. Catterson*, 43 Ch. D. 470.

undoubted right of every owner to open any windows he may desire. But the landowner, who is annoyed by the opening of new windows overlooking his ground, can raise an erection so as to obstruct the light before it has been enjoyed for twenty years before action brought to contest the right; (q) as every landowner may build on his own ground, although the erection entirely deprives the adjoining householder of the light and air. (r) This is his only remedy if he is annoyed by the opening of new windows overlooking his ground. (s) But, in raising an erection in order to obstruct new windows, care must be taken not to interfere with ancient lights which previously existed, for, if it is not possible to obstruct the new windows without at the same time interfering with the right to light which already exists, the owner of the servient tenement is prevented from taking advantage of his remedy. (t)

Obstructing
the light to
prevent right.

An owner of a house has no equity to restrain a railway company from taking measures to prevent prescriptive rights from being acquired for windows looking upon their land. (u)

Obstruction
by railway
company.

SECT. IV.—EXTENT OF THE RIGHT TO LIGHT.

(1) GENERALLY.

The right to the use of light may be acquired, not only for the ordinary purposes of domestic life, but for the convenience of trade or manufacture. The extent of the right, acquired by the user, will be proportioned to the actual amount of reasonable enjoyment had during the requisite period; which, if doubtful, is a question of fact to be determined by a jury. (v)

Thus, where the owner of land grants part of the land with a house upon it, which is to be used for business purposes, the intention to be imputed to the parties, in the absence of a special

Grant of
lands for
house to be
used for

(q) See Sect. V. (4) (f), *post*, p. 306, as to interruption of the right; and 2 & 3 Wm. IV. c. 71, s. 3. Where the right is acquired by grant, see Sect. VI. (4) (b), *post*, p. 309.

(r) *Tipling v. Jones*, 11 H. L. C. 290; *Truscott v. Merchant Taylors' Co.*, 11 Ex. 855; *Frewen v. Phillips*, 11 Q. B. N. S. 449; *Turner v. Spooner*, 1 Dr. & Sm. 467. See also *Re Penny and the S. E. Ry. Co.*, 7 E. & B. 660.

(s) *Per Kindersley, V.-C.*, in *Turner v. Spooner*, 35 L. J. Ch., at p. 803.

(t) *Tipling v. Jones*, *supra*. See *Newson v. Pender*, 27 Ch. D. 43, and *post*, p. 293; and see *Ankersen v. Connolly*, 22 T. L. R. 743.

(u) *Bonner v. G. W. Ry. Co.*, 24 Ch. D. 1.

(v) *Martin v. Goble*, 1 Camp. 322; *Lanfranchi v. Mackenzie*, L. R. 4 Ex. 421; not followed in *Lazarus v. Artistic Photo. Co.* 1897, 2 Ch. 214; *Younge v. Shaper*, 21 W. R. 135; *Courtald v. Legh*, L. R. 4 Ex. 126. See also *Fates v. Jack*, L. R. 1 Ch. 295; *Kelk v. Pearson*, L. R. 6 Ch. 809.

business
purposes.

bargain, is that the house is to be granted with light sufficient for all ordinary purposes of business in the locality; and, in considering the effect of such a grant, the Court must look back to the time when the contract between the parties was entered into, and cannot impute an intention that the premises should be used for a special purpose, not shown to be in the mind of either of the parties at that time. (x) See also as to the extent of the right, sub-tit. "Extraordinary or Particular User," *post*, p. 292.

Distinction
between
rights by
prescription
and grant.

It has been said that the nature and extent of a right to light are the same, whether acquired by prescription, or by grant, express or implied. (y) It is submitted, however, that in the case of an implied grant, regard must be had to the circumstances in which it is made. So the fact that proposed buildings were to be used for a particular purpose would, if known to the grantor, fix him with liability not to derogate from the right of the grantee. In the case of a deed of grant there might be something in the deed to show that a particular user was in the contemplation of the parties. (z)

What
amount of
obstruction
plaintiff must
show.

In order to give a right of action, there must be a substantial deprivation of light, sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done; (a) and there is nothing in *Colls' Case* which does not accord with this principle. (b)

Angle of 45°.

There is no conclusion, either as a matter of law, or as a necessary inference of fact, that a building will not substantially interfere with any ancient light if it permits the light to fall on the window at an angle of not less than 45° from the vertical. Any such idea is erroneous. (c)

(x) *Corbett v. Jonas*, [1892] 3 Ch. 137.

(y) *Kelk v. Pearson*, L. R. 6 Ch. 809, *per* Mellish, L.J., at p. 813; *Allen v. Seckham*, 11 Ch. D. 790.

(z) *Myers v. Catterson*, L. R. 43 Ch. D. 470.

(a) *Back v. Stacey*, 2 Car. & P. 465; *Parker v. Smith*, 5 ib., 438; *Calcraft v. Thompson*, 15 W. R. 387; *Clarke v. Clark*, L. R. 1 Ch. 16; *Ecclesiastical Commissioners for England v. Kino*, 14 Ch. D. 213. See *Kelk v. Pearson*, L. R. 6 Ch. 809; *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. 212; *Theed v. Debenham*, 2 Ch. D. 165; *Wilson v. Queen's Club*, [1891] 3 Ch. 522, and cases in next note. For a case of obstruction by a wall at right angles to the building, see *Shiel v. Godfrey*, W. N. 1893, p. 115.

(b) *Per* Farwell, J., in *Higgins v. Betts* (1905), 2 Ch. 210, at p. 216, and at p. 291, *infra*.

(c) *Parker v. First Avenue Hotel Co.*, 24 Ch. D. 282; *Ecclesiastical Commissioners for England v. Kino*, 14 Ch. D. 213; *Hackett v. Baiss*, L. R. 20 Eq. 494; *Myers v. Catterson*, *supra*; *Colls v. Home & Colonial Stores* (1904), A. C. 179, at p. 210, and at p. 291, *infra*.

(2) EXTENT OF THE RIGHT ACQUIRED BY PRESCRIPTION. (d)

The question as to what right to light is acquired by prescription is of the utmost importance to the owners of building property. Is the right which is acquired by statutory prescription a right to a continuance of substantially the whole quantity of light which has come to the windows during the period of twenty years, or is it limited to a sufficient quantity of light for all ordinary purposes of inhabitancy or business? Although the Prescription Act (c) was passed in 1832, it appears that this question was virtually undecided until 1904. (f)

The case of *Colls v. Home and Colonial Stores* (g) is the leading authority upon the question under discussion. In that case the defendants proposed to erect a building in the City of London on the opposite side of the street to that on which the plaintiffs' premises were situated. The new building would deprive the plaintiffs of a substantial amount of light, causing them real damage, though light enough would be left for the ordinary purposes of occupancy of the premises as a place of business, and the selling or letting value of the premises would not be affected thereby. The Court of Appeal granted a mandatory injunction, but the House of Lords dissolved the injunction, saying that to constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before.

Facts in
Colls' Case.

It is important to observe with reference to the foregoing decision, that all the Law Lords based their judgments upon the findings of fact that the proposed building would not affect the selling or letting value of the respondents' premises; and there was also a finding that the diminution of light would not materially affect the respondents' comfort or convenience. This was emphasised in a later case. (h)

Colls' Case
based on
findings of
fact.

The principle laid down in *Colls' Case* was soon to be applied. The test is—
In *Higgins v. Betts*, (i) where an injunction was granted, Farwell, J., ^{How much} _{light is left?}

(d) For the text of s. 4 of the Prescription Act, see p. 306, *post*.

(e) 2 & 3 Wm. IV. c. 71.

(f) See *per* Wright, J., in *Warren v. Brown* (1900), 2 Q. B. 722, at p. 725.

(g) (1904) A. C. 179.

(h) *Per* Cozens-Hardy, L.J., in *Kine v. Jolly* (1905), 1 Ch. 480, at p. 502.

(i) (1905) 2 Ch. 211.

pointed out that the action for interference with light is similar to the right of action for nuisance at common law; but the test of nuisance is not—How much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had? but—How much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind? (*k*)

(3) EXTRAORDINARY OR PARTICULAR USER.

A question which was left unanswered in *Warren v. Brown*, (*l*) namely, whether a special amount of light necessary for a particular business may be acquired by prescription, was practically answered in the affirmative in a former edition of this work, (*m*) authorities (*n*) being cited in support of the proposition that there was no rule that such special amount of light must have been used for the ordinary prescriptive length of time. Although these authorities have not been expressly overruled, it has been decided in a recent case (*o*) that no such right can be acquired by twenty years' user, even though the servient owner have knowledge of the extraordinary or particular user. In that case one of the plaintiffs, an architect, claimed that he was entitled by user for over twenty years to a special amount of light for use in his drawing office. It was held that a right to a special amount of light necessary for a particular business cannot be acquired by twenty years' enjoyment to the knowledge of the owner of the servient tenement. The editors respectfully agree with this decision. It is consonant, moreover, with the principle which was recognised in a recent case in the Privy Council, (*p*) namely, that a man is not

(*k*) See at p. 215 of the report in the L. R. See also *Ankerson v. Connelly* (1906), 22 T. L. R. 743.

(*l*) (1900) 2 Q. B. 722. The judgment of Wright, J., in this case, although reversed by C. A., was restored by the House of Lords in *Colls' Case*.

(*m*) 2nd ed., p. 223.

(*n*) *Moore v. Hall*, 3 Q. B. D. 178; *Att.-Gen. v. Queen Anne Garden & Mansions Co.*, 60 L. T. 759; *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421. See *Tapling v. Jones*, 11 H. L. C. 290; *Adamson v. Gatty*, W. N. 1870, p. 184; *Hertz v. Union Bank of London*, 2 Giff. 686; *Corbett v. Jonas*, *supra*.

(*o*) *Ambler and Fawcett v. Gordon* (1905), 1 K. B. 417. It is somewhat singular that the case of *Lazarus v. Artistic Photo. Co.* (1897), 2 Ch. 214, which would seem to be inconsistent with the judgment of Bray, J., was not called to his attention. It is submitted, however, that having regard to *Colls' Case* (*supra*), *Lazarus v. Artistic Photo. Co.* is no longer law.

(*p*) *Eastern, etc., Telegraph Co. v. Cape Town Tramways Co.* (1902), A. C. 381.

entitled to special protection in the unnatural and extraordinary use of his land.

The owner of a house, whose light to any of his rooms is obstructed, is not disentitled to relief merely because at the time of such obstruction he happens not to be making any use of the room in question. In considering whether the obstruction is such as to cause a nuisance to the occupier, the fact that the room in question may be required for use at some future time must be had regard to. (7)

Non-user at time of action is no bar.

Where ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light will not, in itself, preclude him from obtaining an injunction against the person causing the obstruction. (7)

Diminution of light by plaintiff.

It is no answer to a plaintiff's claim to the easement, to say that he can avoid any damage by certain slight alterations of his buildings, for he cannot be called upon to do this. (8)

No defence that plaintiff can alter his building.

A question of great importance, and one which has given rise to considerable diversity of opinion is, how far the right to light is affected where there has been an enlargement of ancient lights, or an opening of new windows. (t) It is now decided, that the servient owner is not entitled to obstruct ancient lights where the owner of such lights has enlarged his windows, or has opened new windows, unless he can block out the new windows without interfering with the ancient lights; (u) otherwise, he cannot obstruct the light, although it is impossible to block out the new light without interfering with the ancient light. (w) In granting an

Enlarging ancient lights or opening new windows in place of them.

(q) *Yates v. Jack*, L. R. 1 Ch. 295; *Aynsley v. Glover*, L. R. 10 Ch. 283; *Moore v. Hull*, 3 Q. B. 178; *Hackett v. Buis*, L. R. 20 Eq. 494; *Martin v. Hewson*, L. R. 2 Eq. 425; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238; *Corbett v. Jones* 1892, 3 Ch. 137; *Att.-Gen. v. Queen Anne Garden, etc., Co.*, 60 L. T. 750. See also *Parker v. Stanley & Co.*, 50 W. R. 282.

(r) *Staught v. Burn*, L. R. 5 Ch. 163. And see the earlier case of *Ardecleone v. Kelk*, 2 Giff. 683.

(s) *Stokes v. City Offices Co.*, 2 Hem. & M. 650. "A person who wishes to preserve his light has no power to compel his neighbour to preserve the tiles or a mirror which might be better, or to keep them clean. It is quite preposterous to say, 'Let me damage you, provided I apply such and such a remedy.'" *Per Wood, V.-C.*, in *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238.

(t) See *Newson v. Pender*, 27 Ch. D. 43; and *post*, Sect. VI., p. 308.

(u) *Tapling v. Jones*, 11 H. L. C. 290; *Ecclesiastical Commissioners for England v. Kino*, 11 Ch. D. 213; *Aynsley v. Glover*, L. R. 10 Ch. 283. See also *Carriers' Company v. Corbett*, 2 Dr. & Sm. 35; *Cooper v. Hubbuck*, 30 Beav. 160; *Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copstake*, 9 C. B. N. S. 863; *Binckes v. Pash*, 11 C. B. N. S. 324; *Fowler v. Walker*, 51 L. J. Ch. 443; and in Court of first instance, 43 L. J. Ch. 538; *Scott v. Pape*, 31 Ch. D. 554; *Pendleaves v. Monro*, [1892] 1 Ch. 611.

(w) See *Tapling v. Jones*, *supra*.

injunction to restrain an interference with ancient lights, the Court will not make it a condition that new windows, or the enlargement of ancient windows, be blocked up. (*x*)

Alteration
of plane of
window.

Similarly, alteration of the plane of a window does not necessarily involve abandonment. Thus where an owner of a house, having a right to the access of light, pulls it down and rebuilds in its place another house, in which the front is set back and a dormer window converted into a skylight, the right is not lost. (*y*)

This rule also holds in relation to the right acquired under the Prescription Act, sect. 3, which is a right to the access and use of the whole, or a substantial part, of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement. (*z*) Consequently no alteration in the plane of the windows of the dominant tenement, either by advancing or setting back the building, will destroy the right, so long as the owner of the dominant tenement can show that he is using, through the new apertures in the wall of the new building, the same, or a substantial part of the same, light which passed through the apertures into the old building. (*a*)

When right
may be lost
by altera-
tions.

But the right to relief may be lost, even where there is no substantial alteration, if the owner of the dominant tenement has, by his alteration, so confused the evidence that he cannot prove the identity of the light, (*b*) or if the area of the old lights is entirely occupied by a brick wall. (*c*)

The owner of the new building should be prepared to show not only that some part of the ancient windows coincides with part of the new windows, but which are the exact parts which coincide. (*d*)

Where houses
pulled down
and rebuilt.

Before pulling down an old building with ancient lights, it is, therefore, very important to have a proper plan made showing the exact position of the lights, and to carefully preserve this plan. (*e*) For, if the dominant owner can show that the new windows enjoy the whole or a substantial part of the light which passed into the

(*x*) *Aynsley v. Glover*, L. R. 10 Ch. 283.

(*y*) *National Provincial Plate Glass Insurance Co. v. Prudential Insurance Co.*, 6 Ch. D. 757. See further as to alterations, *post*, p. 309.

(*z*) *Scott v. Pape*, 31 Ch. D. 554; *Harris v. De Pinna*, 33 Ch. D. 238. For the text of the section, see *post*, p. 301.

(*a*) *Ib.*; *Greenwood v. Hornsey*, 33 Ch. D. 471.

(*b*) *Ib.*; *Pendarves v. Monro*, [1892] 1 Ch. 611.

(*c*) *Ib.*

(*d*) *Fowler v. Walker*, 51 L. J. Ch. 443; *Pendarves v. Monro*, *supra*.

(*e*) *Fowler v. Walker*, 51 L. J. Ch. 443; and in Court of first instance, 40 L. J. Ch. 598; *Pendarves v. Monro*, *supra*.

old building, he will be equally entitled to his remedies against any obstruction. (*f*)

The dominant owner cannot acquire any new or additional right to light by enlarging the dimensions, or increasing the number, of windows, but by enlarging his windows he does not lose his rights as to the old parts thereof; (*g*) hence he may alter or improve them in any way he desires, in order to obtain a larger amount of light through the ancient windows. (*h*)

A general grant of lights in a lease, coupled with a covenant for quiet enjoyment, confers on the tenant only the ordinary right to light, as it is known and limited by law, and no greater right. (*i*)

SECT. V.—ACQUISITION OF THE RIGHT TO LIGHT.

Every owner has the right to build on his own land, though he thereby obstructs his neighbour's light and air, unless the latter has acquired a right that his light and air shall not be obstructed. (*k*) The right to light may be acquired in several ways:—

1. By express grant (see below);
2. By the acquiescence of the servient owner (see p. 296);
3. By implied grant (see p. 297);
4. By prescription, either (*a*), under the Prescription Act, (see p. 301), or (*b*) at common law (see p. 307).

(1) EXPRESS GRANT.

It seems that, like all other incorporeal hereditaments, easements can be created only by an instrument under seal; (*l*) but an agreement in writing, or a verbal agreement if there has been part performance, for the creation of an easement may be specifically enforced, and, if necessary, a proper deed ordered to be executed. (*m*)

It seems that such a contract is within the fourth section of the Statute of Frauds, as being an interest in land; but, whether it is or not, if part performed, it can be enforced. (*n*)

(*f*) See cases *supra*, p. 294. And see *Fowler v. Walker*, 51 L. J. Ch. 443; *Newson v. Pender*, 27 Ch. D. 43; *Pendarves v. Munro*, [1892] 1 Ch. 611.

(*g*) *Scott v. Pape*, 31 Ch. 554; *Tupling v. Jones*, 11 H. L. C. 290, *supra*.

(*h*) *Ib.*

(*i*) *Leech v. Schweder*, L. R. 9 Ch. 463.

(*k*) *Tupling v. Jones*, 11 H. L. C. 290.

(*l*) Gale (7th ed. 1899), p. 32. As to acquiescence, see *infra*.

(*m*) *McManus v. Cooke*, 35 Ch. D. 681.

(*n*) *Ib.*

Altering windows in order to admit more light.

Effect of grant of light in a lease.

Agreement to grant an easement is within Statute of Frauds.

A clause in an agreement for rebuilding, that such of the windows and lights in the new house as should occupy the site of ancient lights should have all the rights of ancient lights, was construed as a grant of the easement of light to such windows over any land of the lessor. (o)

(2) ACQUIESCENCE.

Acquiescence
of the servient
owner.

Under some circumstances, an easement of light may be created by acquiescence. But mere acquiescence only is not sufficient; there must be some act or conduct showing a consent to the easement, or some active encouragement, and the onus lies on the owner of the dominant tenement to produce such evidence as leads clearly and conclusively to the inference of a licence or covenant. (p)

Right to open
new window.

The fullest knowledge with entire, but mere, acquiescence, cannot bind a party who has no means of resistance, and this with good reason; for it is far more just and convenient that the party who seeks to add to the enjoyment of his own land, by anything in the nature of an easement upon his neighbour's land, should first secure the right to it, by some unambiguous and well-understood grant of it from the owner of that land, than that such right should be acquired gradually, as it were, and almost without the cognisance of the grantor, by any enjoyment for less than the full statutory period of twenty years. (q)

Evidence of
acquiescence.

An instance of what will be considered sufficient evidence of acquiescence will be found in *Cotching v. Bassett*. (r) There, in rebuilding, windows were altered, additional windows made, plans submitted to the defendants' surveyor, and the works executed under the superintendence of the defendants' surveyor, who made no objection to the plans, or to the mode in which the works were being carried out. After the plaintiffs had completed their building, the defendants gave them notice of their intention to raise a party wall in a manner greatly to interfere with the plaintiffs' lights, but they were restrained from so doing.

(o) *Low v. Innes*, 10 Jur. N. S. 1037. As to express contracts between landlord and tenant, see *Davies v. Marshall*, 1 Dr. & Sm. 557; *Hertz v. Union Bank of London*, 2 Giff. 686. See also *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630; *Gardner v. Hodgsons's Brewery Co.* (1901), 2 Ch. 198.

(p) *Cotching v. Bassett*, 32 Beav. 101. See also *Blanchard v. Bridges*, 4 Ad. & E. 176; *Dunn v. Spurrier*, 7 Ves. 235; *Davies v. Sear*, L. R. 7 Eq. 427.

(q) *Blanchard v. Bridges*, 2 Ad. & E. 176.

(r) *Supra*; *McManus v. Cooke*, 35 Ch. D. 681.

The question whether there has been submission to or acquiescence in an interruption so as to deprive the plaintiff of his right is a proper one for a jury to determine. (a)

Question for a jury.

(3) IMPLIED GRANT.

It may be stated generally that there can be no implied grant of right to light unless at the time of the transfer of his interest in the dominant tenement the grantor is in a position to make an express grant of the easement over the servient tenement; (t) and it has been held that a mortgagee selling a house under his power of sale and reserving the adjoining land, also included in the mortgage, has power to grant a right to light by implication just as if he were the absolute owner in his own right. (u)

Grant by mortgagee.

A grant of a right to light will be implied in the two following instances: (A) In the first place, if an owner of a house and land adjoining sells the house, and retains or sells the land to a third person after disposing of the house, neither he nor the purchaser of the land may obstruct the light from windows overlooking the adjoining land, for the owner is presumed to have granted a right to light to the windows when granting the house, and he can only convey the land subject to the same burdens to which it was subject when he retained it. (x) And a general grant of land, with an intimation by the purchaser of an intention to build, creates a legal easement of light, and gives the right to prevent the obstruction of light by subsequent purchasers of neighbouring land of the same grantor. (y)

Where owner sells house and retains adjoining land, or sells both simultaneously.

(B) If the owner of the land and the house sells the house and the land at the same moment, the vendor being the same in each

(t) *Glover v. Coleman*, L. R. 10 C. P. 108. For a case in which the plaintiff was held not to have acquiesced, see *Smith v. Smith*, 20 Eq. 500, and *post*, p. 315.

(u) *Quicke v. Chapman* (1903), 1 Ch. 659, approved by Byrne, J., in *Financial Times v. Bell*, 19 T. L. R. 433.

(t) *Born v. Turner* (1900), 2 Ch. 211, and at p. 312 *note post*.

(x) *Booth v. Alcock*, L. R. 8 Ch. 663; *Swansborough v. Coventry*, 9 Bing. 305, approved in *Broonsfield v. Williams* 1897, 1 Ch. 603, p. 298, *post*; *Palmer v. Fletcher*, 1 Lev. 122; *Coutts v. Gorham*, Moo. & Mal. 396; *Palmer v. Paul*, 2 L. J. Ch. 154; *Cox v. Mathews*, 1 Vent. 239; *Frewen v. Phillips*, 11 C. B. N. S. 449; *Compton v. Richards*, 1 Price, 27; *Tenant v. Goldwin*, 2 Lord Raym. 1093; *Wheelodon v. Burrows*, 12 Ch. D. 31; *Russell v. Watts*, 10 A. C. 590; *Allen v. Taylor*, 16 Ch. D. 355; *Pyer v. Carter*, 1 H. & N. 916; *Richards v. Rose*, 9 Ex. 218; *Bailey v. Icke*, 64 L. T. 789. And see *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836, a case of derogation from an implied grant of right to support.

(y) *Robinson v. Graves*, 29 L. T. 7.

No implied warranty of easement of light.

Effect of grant "with lights and appurtenances."

Description of adjoining land as "building land."

Rights to light on a building estate.

case, and both purchasers being aware of the simultaneous conveyances, the purchaser of the land is not entitled to block up the lights. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights, and as part of one transaction he takes the land: he cannot take away the lights from the house; (z) but a contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land. (a)

The conveyance of the house contained the words "together with lights and appurtenances," and the point was raised, but not determined, whether such an *express* mention of appurtenances was sufficient contrary intention within the meaning of sect. 6 of the Conveyancing Act to exclude the general words mentioned in that section. This point, however, appears to have been decided in the affirmative in the subsequent case of *Birmingham, Dudley, etc., Bank v. Ross*. (b)

Where in the conveyance of a house, adjoining land belonging to the grantor was described as "building land," this did not show a "contrary intention" within the meaning of sect. 6 (4) of the Conveyancing Act, 1881, so as to exclude the grantee's right to light under sub-sect. (2) of that section. (c)

The extent of the grantor's interest in the adjoining land must be carefully inquired into before any grant can be implied. For instance, in the case of a building estate, does a builder or building lessee impliedly grant uninterrupted light to the occupier of each house? This point was considered in *Quicke v. Chapman*. (d) There the defendant had agreed to take a piece of land on building leases, the leases to be granted for each house separately when completed, and till then the relation of landlord and tenant between him and the freeholder was not to come into being, but he was to have a mere licence to enter on the land for the purpose of building. He built one house and got his lease, which he then sold to the

(z) *Allen v. Taylor*, 16 Ch. D. 355; *Swansborough v. Coventry*, 9 Bing. 305; *Compton v. Richards*, 1 Price, 27; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Russell v. Watts*, 10 A. C. 590; *Beddington v. Atlee*, 35 Ch. D. 317.

(a) *Greenhalgh v. Brinley* (1901), 2 Ch. 324.

(b) 38 Ch. D. 295, *per* Cotton, L.J., 308.

(c) *Broomfield v. Williams* (1897), 1 Ch. 602, which has been applied in the later case of *Pollard v. Gare* (1901), 1 Ch. 834; and in *Quicke v. Chapman*, 71 L. J. Ch. 879.

(d) (1903) 1 Ch. 659; and in the Court below, 71 L. J. Ch. 879; approved by Byrne, J., in *Financial Times v. Bell*, 19 T. L. R. 443. See also *Birmingham, Dudley, etc., Bank v. Ross*, p. 300, *post*.

plaintiff. On his building another house on the adjoining plot the plaintiff insisted that on the sale of his house the defendant had impliedly granted to him a right to light over the adjoining plot, or that such right had been expressly granted to him under the Conveyancing Act, 1881; but the Court of Appeal held that it was not so, that the whole of the surrounding circumstances, including the nature of the defendant's agreement with the freeholder, must be looked at, to ascertain what grant was to be implied and on what base the Conveyancing Act had to operate; and these surrounding circumstances showed that the defendant had no present interest in the adjoining land which could have enabled him to create an immediate easement by express grant, but only a licence to enter for the purpose of building; that therefore no right to light could be implied, and that there was no grant under the general words supplied to the assignment of the lease under the Conveyancing Act, 1881. (c)

If land forms part of a building estate, and the contract is entered into by reference to a plan in which the estate is marked out in building plots, with a building line marked on the plan so as to extend through all the plots, including the land which is the subject of the contract, the application of the doctrine is not thereby limited or restricted, and, in the absence of further evidence of the existence of a building scheme or of any reservation of right to the grantor, the purchaser from him of an adjoining plot will be restrained from building on his land so as to interfere with the access of light to the house as theretofore enjoyed. (f)

Where property described with reference to a plan.

It is very important, therefore, where an owner of a house and land adjoining sells the house and retains the land, and it is intended to build on the adjoining land, in a manner which may obstruct the lights of the house, that a right so to build should be expressly reserved, and it will not be sufficient to describe the house as abutting on building ground belonging to the seller. (g) The same rule applies to devises as to contemporaneous grants by deed. (h)

Importance of express reservation.

In order that the implied grant may arise, there must, at the time of the sale, be an opening which, it is clear, is to be used as a window; for, if the carcasses of houses are sold in such a condition

There must be a clear opening for windows.

(c) See also *Galwin v. Schweppes* [1902], 1 Ch. 226.

(f) *Pollard v. Gare* (1901), 1 Ch. 834.

(g) *Swansborough v. Coventry*, 9 Bing. 305; *Russell v. Watts*, 10 A. C. 590.

(h) *Phillips v. Lowe*, [1892] 1 Ch. 47; *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761.

that it is not possible to see whether the opening is intended for a door or a window, or if the opening is of an uncertain character, there will be no easement. (*i*)

Where grantor who is lessee of adjoining house subsequently obtains the freehold.

Where a lessor of a house with certain lights is, at the time of the grant, lessee of an adjoining house for a term of years, and he subsequently purchases that adjoining house in fee, the implied grant of a right to light is limited to the term the grantor had in the adjoining house at the date of the lease, and the fact of the subsequent purchase of the freehold in the adjoining house does not extend the implied grant of the right to light. (*k*)

Where the dominant tenement is under lease at time of severance.

A grant of a right to light will be implied, although the dominant tenement is in lease at the time of the alienation of tenements previously in the ownership of the same person. (*l*)

Extent of implied grant.

The maxim that a grantor shall not derogate, does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant, and known to the grantee, (*m*) *c.g.* where it is in the knowledge of all the parties that both the alleged dominant and servient tenements are part of a larger piece of land laid out by a municipal corporation under a building scheme for the improvement of a town. (*n*) The obligation on the grantor not to obstruct his grantee's lights must be measured by the circumstances existing at the date of the grant. (*o*)

Grantee with notice of a building scheme.

But, even where the grantee takes with notice that his house and the adjoining land are all comprised in a building scheme, the grantee is entitled to have his windows unobstructed, except by buildings in compliance with the scheme; for instance, he can prevent hoardings being erected on the adjoining land, (*p*) or, where he buys with notice that the adjoining land is liable to be build on for railway purposes, he is entitled to restrain the erection of buildings not intended for railway purposes. (*q*)

Where the owner sells the land and retains the house.

We have seen that the obligation not to obstruct the purchaser's lights affects the vendor and those claiming under him. But if, on the other hand, the owner of a house and adjoining land sells

(*i*) *Glave v. Harding*, 27 L. J. Ex. 287.

(*k*) *Booth v. Alcock*, L. R. 8 Ch. 663; *Swansborough v. Coventry*, 9 Bing. 305; *Beddington v. Attlee*, 35 Ch. D. 317.

(*l*) *Barnes v. Loach*, 4 Q. B. D. 494. And see *Allen v. Taylor*, L. R. 16 Ch. D. 355; and *Phillips v. Low* (1892), 1 Ch. 47.

(*m*) *Birmingham, Dudley, etc., Bank v. Ross*, 38 Ch. D. 295; *Russell v. Watts*, 10 A. C. 590; *Godwin v. Schweppes* (1902), 1 Ch. 926.

(*n*) *Ib.*

(*o*) *Ib.* And see also *Quicke v. Chapman*, p. 298, *supra*.

(*p*) *Wilson v. Queen's Club*, [1891] 3 Ch. 522.

(*q*) *Myers v. Catterson*, 43 Ch. D. 470.

the land and keeps the house, there is no such implied grant by the purchaser of the land. If there is no special stipulation, the purchaser is free to build on the land sold to him, so as to obstruct the lights of the house retained by the owner, as there is no ground for presuming an intention that a right to light should be reserved by the owner or granted by the purchaser. (*r*) Care should, therefore, be taken, under these circumstances, to see that the conveyance is not absolute, and that there is a proper reservation of easements.

But this rule cannot be invoked, if to do so would be inconsistent with the terms and good faith of the contracts under which the parties derive their title. (*s*) If, on a sale and conveyance of land adjoining a house to be built by a vendor, it is mutually agreed that one of the outer walls of that house may stand wholly, or partly, within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows. (*t*)

Terms of the contracts to be regarded.

A grant of a right to light will not be implied from the covenant for quiet enjoyment in a lease. (*u*)

Covenant for quiet enjoyment.

The mere fact of the existence, in an adjoining house, of windows which overlook a purchased property, is not constructive notice of any agreement giving a right to the access of light to them, and the purchaser who has no notice of such an agreement will not be prevented from building so as to obstruct the windows. (*v*)

Purchaser has not constructive notice of an agreement from existence of windows.

(4) BY PRESCRIPTION.

We now come to the consideration of the acquisition of a right to light under the Prescription Act. Under sect. 3 of that Act, (*x*) "When the access and use of light to and for any dwelling-

(*r*) *White v. Bass*, 7 H. & N. 722. One reason for this may be that an easement of light is not an easement of necessity. See *Gay v. Hazeldine* (1904), 2 Ch. 17. And see *Ellis v. The Manchester Carriage Co.*, 2 C. P. D. 13; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Allen v. Taylor*, 16 Ch. D. 355; *Russell v. Watts*, 10 A. C. 590.

(*s*) *Russell v. Watts*, 10 A. C. 590.

(*t*) *Ib.*

(*u*) *Potts v. Smith*, L. R. 6 Eq. 311. See, however, *Leech v. Schweder*, L. R. 9 Ch. 463.

(*v*) *Allen v. Seckham*, 11 Ch. D. 790. *Goddard on Easements* (6th ed.), p. 288.

(*x*) 2 & 3 Will. IV. c. 71.

house, workshop, or other building, (*y*) shall have been actually enjoyed therewith (*z*) for the full period of twenty years (*a*) without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; (*b*) unless it shall appear that the same was enjoyed by some consent or agreement (*c*) expressly made or given for that purpose (*d*) by deed or writing."

Although the statute has materially altered the mode of acquiring a title to a right to light, it has not altered the case as to the nature and extent of light to which the owner of the dominant tenement is entitled. (*c*)

(*a*) "*Dwelling-house, workshop, or other Building.*"—The words "other building" mean some building of a like character with a dwelling-house, or workshop, and do not necessarily include every structure which may be a building for the purposes of the London Building Act. (*f*) Every structure is not a building; the absence of glass is not decisive, though, of course, if there is glass, there is an obvious design on the part of those who use the structure to bring in light and enjoy it. (*g*) The question is really one of fact.

(*b*) "*Access*" and "*Use.*"—The section requires that two things shall have been enjoyed: "access," which means over the neighbour's land; and "use," which must be the use of light so coming, by the person who claims the right. (*h*)

Both that access and use must have been actually enjoyed with the house, and for the full period of twenty years without interruption; but enjoying the use does not mean shall have continually used: enjoyed means "having had the amenity or advantage of using" the access of light; that is nearly equivalent to "having had the use," the intention being that the owner of a house may acquire the right to have the access of light over adjoining land to an opening which he has used in such manner as suited his convenience for the passage of light during twenty years. (*i*) In

(*y*) As to the meaning of these words, see *infra*.

(*z*) See p. 303, *post*.

(*a*) See p. 303, *post*.

(*b*) See p. 304, *post*.

(*c*) See p. 305, *post*.

(*d*) As to meaning of these words, see p. 305, *post*.

(*e*) *Kelk v. Pearson*, L. R. 6 Ch. 809.

(*f*) *Harris v. De Pinna*, 33 Ch. D. 238. And see *ante*, p. 287, as to the nature of the erection in this case.

(*g*) *Ib*.

(*h*) *Cooper v. Straker*, 40 Ch. D. 21.

(*i*) *Ib*.; *Yates v. Jack*, L. R. 1 Ch. 295; *Calcraft v. Thompson*, 15 W. R. 387; *Courtauld v. Legh*, L. R. 4 Ex. 126.

Courtauld v. Legh (k) it was intimated that there might be an exception in the case of "windows with iron shutters *fixed* behind them;" but the essential word in that sentence is "fixed," which obviously means either shutters that will not open, or shutters that are never, in fact, opened during the twenty years. (l)

But, in the case of windows with movable shutters which are opened at the owner's pleasure for admission of light, the right is gained at the end of twenty years if he opens them at any time he pleases for the admission of light during those twenty years, and there is no such interruption of access over the neighbouring land as is contemplated by sect. 4 of the Prescription Act, 1837. (m)

The period begins as soon as the exterior walls of the building with the spaces for the windows are completed, and the building is properly roofed in, although the window sashes and the glass may not be put in, and the interior may not be finished, until some time afterwards; for "enjoyed" does not necessarily imply that the building must be occupied, or even fit for occupation, during the whole of the twenty years. (n)

In order to acquire the right, it must be shown not only that there has been an uninterrupted access of light to the building in respect of which the easement is claimed, but also that the light has reached the building by one and the same definite channel for the statutory period. (o)

(c) *Actually enjoyed for the Full Period of Twenty Years.*—The time during which there is a unity of the possession of the dominant and servient tenements is to be excluded in the computation of the twenty years. The twenty years need not be continuous; they may be partly before and partly after the unity of possession. The easement may be suspended during the union of ownership, and revived upon the severance of that union. (p)

A right to light can be acquired although the servient tenement is held by a tenant under a lease, and, when so acquired, it is valid against the landlord; and where the dominant and servient tenements are demised by the same owner to two different tenants, one tenant may by twenty years' enjoyment acquire an absolute right

Windows with movable shutters.

When period begins.

House need not be occupied.

Use of same definite channel to be proved.

Time during unity of possession.

One tenant against another.

(k) *Supra*.

(l) *Per Kay, J., Cooper v. Straker*, 40 Ch. D. 21.

(m) *Cooper v. Straker*, 40 Ch. D. 21.

(n) *Collis v. Laughler*, [1894] 3 Ch. 659; *Courtauld v. Legh*, L. R. 4 Ex. 126.

(o) *Harris v. De Pinna*, 33 Ch. D. 233. And see *Scott v. Pape*, 31 Ch. D. 544.

(p) *Ladyman v. Grave*, L. R. 6 Ch. 763; *Simper v. Foley*, 2 J. & H. 555; *Harbridge v. Warwick*, 3 Ex. 552; *Aynsley v. Glover*, 10 Ch. 283.

to light; (*q*) not limited in time by the duration of the lease, for an easement for a term of years cannot be created by prescription, either under the statute or at common law, though it can by express grant. (*r*)

Occupation
need not be
by the same
person.

The fact that the premises have not been in the occupation of the same person all along, is clearly immaterial, (*s*) and it makes no difference that the lease has come to an end, and been renewed, or agreed to be renewed, by the ground landlord. (*t*)

Crown
freeholds.

The third section of the Act does not bind the Crown. (*u*)

Exception of
rights as to
use of adjoining
land.

Where the lease is of the house and appurtenances "except rights, if any, restricting the free use of any adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise," the exception does not operate as an agreement or consent on the part of the lessee that the owners of the adjoining land may always build to obstruct the light, but only preserves to the lessor the right, until an adverse right is acquired by prescription, of derogating from his grant and doing what he likes with the adjoining property; (*w*) but if there is an express proviso that the landlord shall have power to build on the adjoining land, whether such buildings shall affect the light and air or not, the result is different. (*x*) In that case such a clause was contained with reference to the lessor's "adjoining or contiguous" land, and the lessor was building so as to obstruct the plaintiff's lights on land on the opposite side of the road; and it was held that this land was, by reason of the doctrine that the sub-soil of a road belongs to the adjoining owners *usque ad medium filum viæ*, "adjoining or contiguous," and, therefore, that the land was within the clause of the lease, and the building could not be restrained. But where there was a garden belonging to the purchaser, several yards long, between two houses, it was held that the houses, though near to did not "adjoin" the land of the vendors within the meaning of a somewhat similar covenant. (*y*)

Meaning of
"adjoining or
contiguous"
land.

(*q*) *Frewen v. Phillips*, 11 C. B. N. S. 449; *Simper v. Foley*, 2 J. & H. 555. An easement, such as right of way, stands on a different footing, and cannot be acquired by a tenant by user over land occupied by another tenant under the same landlord. *Kilgour v. Gaddes* (1904), 1 K. B. 457.

(*r*) *Wheaton v. Mayle*, [1893] 3 Ch. 48; *Mitchell v. Cantrill*, 37 Ch. D. 56; *Robson v. Edwards*, [1893] 2 Ch. 146.

(*s*) *Robson v. Edwards* (1893), 2 Ch. 146.

(*t*) *Ib.*

(*u*) *Wheaton v. Maple* (1893), 3 Ch. 48; *Perry v. Eames* (1891), 1 Ch. 658.

(*w*) *Mitchell v. Cantrill*, *supra*.

(*x*) *Haynes v. King*, [1893] 3 Ch. 439.

(*y*) *Ind, Coope & Co., Ltd. v. Hamblin*, 84 L. T. 168, reversing Buckley, J., 81 L. T. 779.

(d) "*Without Interruption.*"—Whether an interruption is submitted to or acquiesced in, within the meaning of the statute, must depend on the circumstances of each case, and the conduct of the parties, and this is a question for the jury. (z) It is not necessary that an action for obstruction should be commenced to rebut the idea of acquiescence or submission, for any conduct indicative of active resistance is sufficient. (z)

It seems that the person who asserts that an alleged twenty years' enjoyment of light has been interrupted during that period, is bound, under sect. 4 of the Prescription Act, to prove that some notice, other than that which arises from the mere existence of a physical obstruction, was given to the person interrupted, of the person by whose authority the interruption was made. (a)

(e) "*Any Local Usage or Custom to the Contrary notwithstanding.*"—The ancient custom of the City of London, whereby the owner of a house in any street was permitted to raise it to whatever height he might think fit, and all such local customs, are abolished by the Act. (b)

Under sect. 3 of the Prescription Act, 1832, no right is acquired, if it appears that it was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. (c) It is not necessary that the agreement should be signed by both parties, and an agreement in writing, signed by the person who obtained the lights, will satisfy the requirements of the statute. (d)

The section refers to a deed or writing purporting to give consent to an enjoyment as a matter of revocable leave and license, and not to one which gives consent as a matter of irrevocable right; (e) and if a consent or agreement be given or made whereby the prescriptive period is prevented running, it can be terminated

(z) *Gale v. Atket*, 8 Jur. N. S. 987; *Bennison v. Cartwright*, 5 B. & S. 1. But cf. *Glover v. Colena*, L. R. 10 C. P. 108. See also as to interruption, p. 306, post.

(a) *Selden v. Bank of Holten*, 19 Ch. D. 462.

(b) *Yates v. Jack*, L. R. 1 Ch. 295. See also *Sillers' Company v. Jay*, 3 Q. B. 111; *Truslett v. Merchant Taylors' Company*, 11 Ex. 855; *Perry v. Eames*, [1891] 1 Ch. 658.

(c) See *Mayor of London v. Porters' Company*, 2 Moo. & R. 409; *Thackeray v. Wood*, 5 B. & S. 325; 6 B. & S. 766; *Tapling v. Jones*, 11 H. L. C. 290.

(d) *Bewley v. Atkinson*, 13 Ch. D. 283; *Mitchell v. Cantrill*, 37 Ch. D. 56; *Haynes v. King*, [1893] 3 Ch. 439; *Goddard on Easements* (6th ed.), p. 292.

(e) Per Wright, J., in *Simpson v. Corporation of Manchester*, 64 L. J. Ch. 837. See *Ruscoe v. Grounsell*, 89 L. T. 426, where the effect of an inscription on a stone in a wall was considered.

at any time by notice, and the period of twenty years will then begin to run. (*f*)

(*f*) *How the Twenty Years are to be computed.*—Sect. 4 of the Prescription Act provides for the method by which the period of twenty years is to be computed. (*g*)

The words “suit or action” as used in this section refer to any action in which the right is questioned, and not merely to the action then pending. (*h*)

What must
be proved.

In order to support the plea of enjoyment during the period, actual user must be proved in the *first* (*i*) and in the *last* (*k*) years of the period relied on.

What con-
stitutes an
interruption

An uninterrupted enjoyment of more than nineteen years cannot be defeated by any subsequent interruption, not acquiesced in. (*l*)

Intermittent
interruptions

To constitute an interruption under the fourth section there must be an actual discontinuance of the enjoyment in fact, by reason of an obstruction submitted to or acquiesced in for a year. (*m*) But repeated interruptions in fact, though each too short to operate as “an interruption,” may yet be sufficient, and are good evidence to show that the user all through was “contentious,” and so not a user “as of right” within the statute. (*n*) Mere non-user is not an “interruption.” (*o*)

The temporary use for more than one year of interior boarding and open shelving, by which a material interference with the light

(*f*) *Greenhalgh v. Brindley* (1901), 2 Ch. 324; *Easton v. Isted* (1903), 1 Ch. 405.

(*g*) It provides as follows: “That each of the periods of years, hereinbefore mentioned, shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question.” It further provides “that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.” See notes to this section in *Gale on Easements* (7th ed. 1899), p. 182.

(*h*) *Cooper v. Hubbuck*, 12 C. B. N. S. 456.

(*i*) *Bailey v. Appleyard*, 8 Ad. & E. 161; *Carr v. Foster*, 3 Q. B. 581.

(*k*) *Parker v. Mitchell*, 3 P. & D. 655. See also *Lowe v. Carpenter*, 6 Ex. 825; *Flight v. Thomas*, *infra*.

(*l*) *Flight v. Thomas* (Ex. Ch.), 11 Ad. & E. 688; (in H. L.) 8 Cl. & F. 231. And see *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267; *Bridewell Hospital v. Ward, Lock & Co.*, 62 L. J. Ch. 270, and *infra*, p. 307.

(*m*) *Plasterers' Company v. Parish Clerks' Company*, 6 Ex. 630. See *Ladyman v. Grave*, *ante*, p. 303, as to interruption by unity of possession.

(*n*) *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267, *supra*; *Gale* (7th ed.) p. 205. See *Rogers v. Taylor*, 2 H. & N. 828. As to what will be a sufficient submission, see *Gale v. Abbot*, 8 Jur. N. S. 987.

(*o*) *Carr v. Foster*, 3 Q. B. 581. See *Hollins v. Verney*, 13 Q. B. D. 304.

had been caused, was held to be a mere discontinuance of user, and not an adverse obstruction or "interruption" within the section. (p)

(g) *Onus of Proof under the Prescription Act.*—A *prima facie* case of enjoyment must be proved affirmatively by a person who alleges a twenty years' enjoyment of light. The defendant, however, when the plaintiff has done this, may displace the *prima facie* case, either by proving the existence of an obstruction at the commencement of the twenty years, or a statutory interruption of the enjoyment at some time during the twenty years, or by showing, by other evidence, that the plaintiff's evidence of enjoyment cannot be relied on. (q) If it appear, on the plaintiff's evidence, that there has been some interruption, which in its nature is permanent, the onus is on the plaintiff of proving that such interruption did not, in fact, continue with his acquiescence for a year; but if the interruption is in its nature fluctuating and temporary, the onus of proving that it, in fact, continued and was acquiesced in by the plaintiff for a year, lies on the defendant. (r)

(h) *Period of Prescription.*—Under sect. 6 of the "Act (s) no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act, as may be applicable to the case and to the nature of the claim." (s) It has been held (t) that where the access of light has been enjoyed without interruption for nineteen years and a fraction, and then an interruption takes place, the Court will not interfere to protect the inchoate right by injunction before the lapse of the full period of twenty years, and an inchoate title cannot be treated as complete, even if effectual interruption before the title becomes absolute is impossible. (u)

No prescription allowed for shorter periods than mentioned in the Act.

(i) *Prescription by Common Law.*—The Act (w) has not taken

(p) *Smith v. Baxter* (1900), 2 Ch. 138.

(q) *Seddon v. Bank of Bolton*, 19 Ch. D. 462. See 2 & 3 Will. IV. c. 71, s. 4.

(r) *Presland v. Bingham*, 41 Ch. D. 268.

(s) 2 & 3 Will. IV. c. 71.

(t) *Governors of Bridewell Hospital v. Ward, Lock, Bowden & Co.*, 62 L. J. Ch. 270, approved by North, J., in *Battersea (Lord) v. Commissioners of Sewers for London* (1895), 2 Ch. 708.

(u) *Battersea (Lord) v. Commissioners of Sewers for London* (1895), 2 Ch. 708, *supra*.

(w) See *Darling v. Clue*, 4 F. & F. 329; *Bright v. Walker*, 1 C. M. & R. 217.

away any of the modes of claiming easements which existed before that statute. A title to the access of light can also be acquired by proof of enjoyment from time immemorial, and a prescriptive common law right thus established. (x)

SECT. VI.—EXTINCTION OR ABANDONMENT OF THE RIGHT.

(1) GENERALLY.

By express
release.

It would appear that, in the case of easements, as of other incorporeal rights, an express release, to be effectual, must be under seal. This rule, however, must not be taken to exclude a written instrument not under seal, or even a parol declaration, as evidence to show the character of any act done, or any cessation of enjoyment. (y) In equity, an easement may be lost or diminished by agreement or acquiescence. (z)

(2) WHERE RIGHT HAS BEEN THE SUBJECT OF A LICENCE.

A licence executed is not countermandable, but is so where it is executory; that is to say, if a person, acting upon a permission granted, executes work of a permanent character, and incurs expense in consequence of the licence, the licensor cannot revoke his licence, and make the licensee destroy his work, or treat him as a wrongdoer. (a)

(3) WHAT CONSTITUTES ABANDONMENT.

Difficult questions sometimes arise as to whether the right of light to apertures, which have been closed by the owner of a building, is entirely lost, as having been abandoned, or whether the windows have only been closed for temporary purposes. Non-user must be of such a character that a release of the right granted can be presumed, in order to destroy an easement of a positive kind by abandonment; but no release of a right need, or indeed can, be presumed in the case of light, for there is no right to reconvey, but,

[†] (x) *Aynsley v. Glover*, L. R. 10 Ch. 283. See also *Duke of Norfolk v. Arbuthnot*, 5 C. P. D. 390. See the remarks of Selborne, L.C., in *Dalton v. Angus*, 6 App. Cas., at p. 794.

(y) *Gale* (7th ed.), 482.

(z) *Salaman v. Glover*, L. R. 20 Eq. 444. See also *Waterlow v. Bacon*, L. R. 2 Eq. 514.

(a) See *McManus v. Cooke*, 35 Ch. D. 681; *Winter v. Brockwell*, 8 East, 308. See also *Davies v. Marshall*, 10 C. B. N. S. 697. See also *Liggins v. Inge*, 7 Bing. 682; *Wallis v. Harrison*, 4 M. & W. 538; *Mold v. Wheatcroft*, 27 Beav. 510; *Bankart v. Tennant*, L. R. 10 Eq. 141.

instead, the servient owner must be regarded as released from his obligation not to build, created by his implied covenant. (*b*)

As to the effect of unity of possession, see *ante*, p. 303.

Unity of
possession.

(4) ALTERATION OF LIGHTS.

(*a*) *Alteration of Lights acquired by Prescription.*—The owner of a light acquired by prescription does not lose his right merely from the circumstance that he has opened new windows close to the ancient light, or that he has altered the size and position of the latter—that is, always assuming that some portion of the altered window corresponds with some portion of the ancient light. (*c*)

(*b*) *Alteration of Lights acquired by Grant.*—The effect of altering the size or position of windows acquired by grant, is very different from the case of rights acquired by prescription. For, where the right is created by grant, it is probably the intention of the grantor that his grantee should only have the right to a window of a certain size, or in a certain position. A material alteration, therefore, in the size or position of a window, the right to which has been acquired by grant, may possibly destroy the right, though a trifling alteration would not have that effect. (*d*)

The alteration of the purpose or object for which the building is to be used, as a conversion of a workshop into a house, or of a house into a workshop, has not the effect of abandoning the right. (*e*)

SECT. VII.—REMEDIES FOR INTERFERENCE WITH THE RIGHT.

(1) GENERALLY.

The remedies for the infraction of the right to light are by action for damages or for an injunction, or, as is usually the practice,

b *Goddard on Easements* (6th ed.), p. 555, *et seq.*; *Moore v. Rawson*, 3 B. & C. 332; *Stokoe v. Singers*, 8 E. & Bl. 31. See also *Cooper v. Straker*, 40 Ch. D. 21; *Preshut v. Bingham*, 41 Ch. D. 268; *Pendarves v. Monro*, [1892] 1 Ch. 611; *Ecclesiastical Commissioners v. Kino*, 14 Ch. D. 213; *Davies v. Marshall*, 10 Q. B. N. S. 697; *Carriers' Company v. Corbett*, 2 Dr. & Sm. 355; *Greenwood v. Hornsey*, 33 Ch. D. 471; *Scott v. Pape*, 31 Ch. D. 554; *Tapling v. Jones*, 11 H. L. C. 290, considered in *Newson v. Pender*, 27 Ch. D. 43; *Hutchinson v. Capestake*, 9 C. B. N. S. 863; *Arcebeckne v. Kell*, 2 Giff. 683; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Cook v. Mayor of Bath*, L. R. 6 Eq. 177. As to questions relating to abandonment only arising after easement acquired, see *Tapling v. Jones*, *supra*. See *ante*, p. 291, as to pulling down building and rebuilding.

c *Ante*, p. 295; *Tapling v. Jones*, 11 H. L. C. 290; *Newson v. Pender*, 27 Ch. D. 43, *supra*; *Scott v. Pape*, 31 Ch. D. 554, *supra*; *Greenwood v. Hornsey*, 33 Ch. D. 471, *supra*; *Pendarves v. Monro* (1892), 1 Ch. 611, *supra*. And see *Ecclesiastical Commissioners v. Kino*, 14 Ch. D. 213.

d See *Blanchard v. Bridges*, 4 Ad. & E. 176.

e *Ecclesiastical Commissioners v. Kino*, 14 Ch. D. 213.

for both damages and an injunction. (*f*) In addition, a person is allowed to obtain redress by removing the obstructing object, but it is a very dangerous remedy, and rarely employed, as it might lead to breaches of the peace. (*g*)

What is
necessary
in order to
maintain
an action.

In order to give a right of action for the obstruction of light, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done. (*h*)

(2) WHO MAY BRING AN ACTION.

Person having
interest.

An action may be instituted for obstruction of ancient windows by any person who has an interest in the building to which the right is attached, and who has suffered injury by such obstruction.

Tenant from
year to year.

For instance, a tenant from year to year may bring an action, but the injunction will, it seems, be limited to the period of the continuance of the plaintiff's tenancy, (*i*) and a tenant from year to year under notice to quit may obtain an injunction. (*k*)

So, also, a lessee whose lease has expired during the obstruction, but who has agreed for a renewal of his lease, can maintain an action. (*l*) And the Court will restrain the interference with ancient lights, although the plaintiff is not the occupier of the house interfered with, and may have no intention of occupying it. (*m*)

Where the sole plaintiff in an action for a mandatory injunction and damages for obstruction to the access of light to a freehold house dies, the executor can continue the action for damages, and a devisee of the house can continue the action for an injunction; (*n*)

(*f*) Judicature Act, 1873; 36 & 37 Vict. c. 66, s. 24, sub-s. 7; s. 25. The principle upon which the Court should act in awarding damages instead of granting an injunction, was discussed by Buckley, J., in *Cowper v. Laidler* (1903), 2 Ch. 337.

(*g*) *Hyde v. Graham*, 1 H. & C., per Pollock, C.B., at p. 598. See *Rex v. Roswell*, 2 Salk. 459; *Arnold v. Jefferson*, Holt, 498; *Thompson v. Eastwood*, 8 Ex. 69.

(*h*) *Back v. Stacey*, 2 C. & P. 465; *Colls v. Home and Colonial Stores* (1904), A. C. 179, and p. 291, *supra*; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238; *Att.-Gen. v. Nichol*, 16 Ves. 338; *Jackson v. Duke of Newcastle*, 33 L. J. Ch. 698; *Wells v. Ody*, 7 C. & P. 410; *Arcedeckne v. Kelk*, 2 Giff. 683; *Beadel v. Perry*, L. R. 3 Eq. 465; *Aynsley v. Glover*, L. R. 10 Ch. 283; *Moore v. Hall*, 3 Q. B. D. 178.

(*i*) *Simper v. Foley*, 2 John. & H. 555.

(*k*) *Jacob v. Knight*, 3 De G. J. & S. 533.

(*l*) *Gale v. Abbot*, 10 W. R. 748; *Robson v. Edwards*, [1893] 2 Ch. 146.

(*m*) *Wilson v. Townend*, 1 Dr. & Sm. 324. See *Fox v. Pursell*, 3 Sm. & Giff. 242, as to a tenant under an agreement for a lease.

(*n*) *Jones v. Simes*, 43 Ch. D. 607.

and apparently an executor can himself begin an action for damages, if the action be brought within six months of the death of his testator according to the Civil Procedure Act, 1834, (o) sect. 2.

An action may also be maintained by the reversioner, either for damages or an injunction, if the interference be of a permanent nature and injurious to the reversion; but, if the injury caused by the obstruction is only an injury to the occupier of the house alone, the reversioner is incapable of suing. (p) The question is, whether the obstruction is only of a temporary character, or of such a permanent character as really to produce injury to the reversioner, and this is a question of fact for the jury. (q) A boarding on poles, in order to block out the access of light, is not of such a permanent character as to injure the reversion. (r)

(3) AGAINST WHOM AN ACTION MAY BE BROUGHT.

Any one who obstructs the light is liable to an action; and each successive owner in occupation of the servient tenement is liable for the continuance of an obstruction, though it may have been commenced before his time. But if the person sued did not originally erect the obstruction, a request must have been made to him to remove it, before the action is brought. It is sufficient if such request is made to the party in possession, though he be only the lessee; or to a former occupier, while in possession. (s)

The continuance of an obstruction to ancient lights being an "injury committed" in respect of property within sect. 2 of the Civil Procedure Act, 1834, (t) an action may be brought against the executors of a deceased owner who caused it, although the obstructing building was completed more than six months before his death. (u)

(o) 3 & 4 Will. IV. c. 42.

(p) *Wilson v. Townend*, 1 Dr. & Sm. 324; *Metropolitan Association v. Petch*, 5 C. B. N. S. 504; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238; *Jesser v. Gifford*, 4 Barr. 2141; *Shadwell v. Hutchinson*, 2 B. & Ad. 97; *Aynsley v. Glover*, L. R. 10 Ch. 283; *Cooper v. Crabtree*, 20 Ch. D. 589; *Shelfer v. City of London, etc.*, Co., [1895] 1 Ch. 287.

(q) *Metropolitan Association v. Petch*, *supra*.

(r) *Cooper v. Crabtree*, *supra*, distinguishing *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78. In *Cooper v. Crabtree* the scaffold was erected for the purpose of asserting a right which the defendant really had.

(s) *Penruddorke's Case*, 5 Rep. 101; *Jones v. Williams*, 11 M. & W. 176; *Salmon v. Bensley*, Ry. & M. 189; *Roswell v. Prior*, 12 Mod. 635. See also *Carth*, 456; 1 Keb. 994.

(t) 3 & 4 Will. IV. c. 42.

(u) *Jenks v. Clifden (Viscount)* (1897), 1 Ch. 964. For an instance of an

Action
against
executors.

Action
against owner
of land.

If the owner of land on which a nuisance is created lets the land, an action to prevent the continuance of such nuisance will lie, at the option of the party injured, either against the landlord or the tenant. (*w*) But no such action, as a rule, lies against the landlord for any similar act of his tenant done during the continuance of the tenancy. (*x*)

The owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights. (*y*)

(4) WHAT RELIEF WILL BE GRANTED.

The relief which will be granted for an obstruction of light must depend on the extent to which the defendant has been allowed to execute the obstruction. In the first place, where the structure producing obscuration has not been commenced, an injunction may then be obtained to restrain the threatened injury. Secondly, although the structure has been commenced, but has not been erected to such a height as to produce obscuration, the defendant may be restrained from continuing the work. And thirdly, where the work has been executed to such an extent as to produce obscuration, a mandatory injunction, directing the defendant to pull down the structure, may sometimes be obtained; but this remedy is only granted under exceptional circumstances; as a rule, the Court in such a case gives damages.

(*a*) *Interlocutory Injunctions to restrain building*.—In actions in the Chancery Division, in order to prevent the erection of a proposed building, or to compel the pulling down of one recently erected, and which interferes with a right to light, it is usual to apply, without delay, for an interlocutory injunction. (*z*) Where the circumstances are pressing and render it necessary, it may be obtained *ex parte*; (*a*) or, where time permits, it is generally the safer course to give notice of the motion, when both parties are heard on the application.

action against a builder, see *Born v. Turner* (1900), 2 Ch. 211; and for an action against a railway company, see *Courage & Co. v. South Eastern Ry. Co.*, 19 T. L. R. 61.

(*w*) *Todd v. Flight*, 9 C. B. N. S. 377; *Mason v. Shrewsbury & Hereford Ry.*, L. R. 6 Q. B. 578.

(*x*) *Gale* (7th ed.), p. 557; *Cheetham v. Hampson*, 4 T. R. 318; *Rich v. Basterfield*, 4 C. B. 783; *Bishop v. Trustees of Bedford Charity*, 1 El. & El. 697. But see *R. v. Peddy*, 1 A. & E. 822.

(*y*) *Thomlinson v. Brown*, Sayers, 215. See also 4 Burr. 2141; 3 Leon. 109.

(*z*) Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 24, 25, sub-s. 8. R. S. C. 1883, Ord. 50, r. 6. See *ante*, p. 244, as to injunctions.

(*a*) *Per Lindley, J., Anon.*, W. N. 1876, p. 12.

Upon an application for an interlocutory injunction, the Court will see if there is a fair question of right to be tried at the hearing; and will consider whether the balance of convenience is in favour of granting an injunction, rather than of allowing the defendants to complete their building with an undertaking to pull it down, if required to do so. (*b*)

When granted.

A mandatory injunction may be granted, on motion, before the hearing of the cause. (*c*) But it will only be so granted under very special circumstances. (*d*)

Where an interlocutory injunction has been granted on the usual undertaking as to damages, if it is afterwards established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, though the plaintiff was not guilty of misrepresentation, suppression, or other default in obtaining the injunction. (*e*)

Undertaking as to damages on granting interlocutory injunction.

Before granting an interlocutory injunction, the Court will consider the conduct of the parties, and whether there has been any acquiescence on the part of the person injured. (*f*) It is not absolutely necessary to obtain an interlocutory injunction; and, where it has not been applied for, the Court may, notwithstanding, think fit to grant a perpetual injunction at the hearing. (*g*) The remarks of Jessel, M.R., in the important case of *Aynsley v. Glover*, (*h*) will be found very useful as a guide upon these principles and the effect of delay.

Delay in applying for injunction.

Where an obstruction to light and air had existed nearly six years before the action was commenced, and the plaintiff and his servants could never have gone into a stable without perceiving it, the action was dismissed. (*i*) If the building is erected without

(*b*) *Neave v. Pender*, 27 Ch. D. 43, a case of alteration of windows.

(*c*) *Beadel v. Perry*, L. R. 3 Eq. 465; *Hervy v. Smith*, 1 K. & J. 389.

(*d*) See *infra*, and *post*, p. 315; *Westminster Brymbo Coal Co. v. Clayton*, 36 L. J. Ch. 476; *Bonner v. Great Western Ry. Co.*, 24 Ch. D. 1; *Daniel v. Ferguson*, [1891] 2 Ch. 27; *Van Juel v. Hornsey* (1895), 2 Ch. 774, and at p. 245, *note*.

(*e*) *Griffith v. Blake*, 27 Ch. D. 474, dissenting from *dictum* of Jessel, M.R., in *Smith v. Day*, 21 Ch. D. 421.

(*f*) See *ante*, p. 246, as to this, and *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Durrell v. Pritchard*, L. R. 1 Ch. 244; *Jacob v. Knight*, 3 De G. J. & S. 533, a case of injury to health; *Gale v. Abbot*, 8 Jur. N. S. 987. See *Dyers' Company v. King*, L. R. 9 Eq. 438. As to the difference between the acquiescence which will justify the refusal of an interlocutory and of a perpetual injunction, see *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Turner v. Mirfield*, 34 Beav. 390. See *cases, ante*, pp. 246, 249, as to delay in applying for injunctions; *Betts v. Clifford*, 1 John. & H. 74; *Davis v. Marshall*, 1 Dr. & Sm. 557.

(*g*) But see *infra* as to mandatory injunctions.

(*h*) L. R. 18 Eq. at p. 553; and see, too, *The Carriers' Company v. Corbett*, 2 Dr. & Sm. 355, 360.

(*i*) *Gaunt v. Fynney*, L. R. 8 Ch. 14.

the plaintiff's knowledge, he may sue for an injunction after its completion. (k)

Mere delay may amount to laches, and deprive the plaintiff of his right to an injunction. (l)

Where injunction will be granted.

The rule is, that wherever an action can be maintained at law, and really substantial damages, that is to say, considerable damages, can be recovered for an obstruction already erected, there an injunction will generally be granted (m) to restrain the erection of a proposed building, or the enlargement of an existing building. This rule is subject to the considerations which will influence the Court in granting an interlocutory injunction. (n)

"Substantial damages."

What are substantial damages it is difficult to say, but probably "substantial damages" means damages to an appreciable amount, as distinguished from some small sum of £5, £10, or £20; (o) the ground for the rule being that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour have a right to purchase him out without any Act of Parliament for that purpose having been obtained.

Refused where no substantial injury proved.

Injunctions, therefore, have been refused, on the ground that the plaintiff has not proved substantial injury. (p) The mere possibility of future injury is not a ground for granting an injunction. (q) But

(k) *Darrell v. Pritchard*, L. R. 1 Ch. 244.

(l) *Wicks v. Hunt*, John. 372; *Cooper v. Hubbuck*, 30 Beav. 160. As to where it has no effect, see *Imperial Gas Light Co. v. Broadbent*, 7 H. L. Cas. 600; *Johnson v. Wyatt*, 9 Jur. N. S. 1333; *Turner v. Mirfield*, 34 Beav. 390. See *Cocks v. Fomaine*, 14 L. T. N. S. 390.

(m) *Per Jessel, M.R., Aynsley v. Glover*, L. R. 18 Eq. 544, 553. See cases, *infra*, as to damages.

(n) *Supra*, p. 313. See *Holland v. Worley*, 26 Ch. D. 578; *Martin v. Price*, [1894] 1 Ch. 276; and *post*, p. 316, as to the discretion of the Court with respect to an injunction or damages.

(o) *Dent v. Auction Mart Co.*, L. R. 2 Eq. at p. 246. For other instances where injunctions have been granted, see *Gale v. Abbot*, 6 L. T. 852; *Stokes v. City Offices Co.*, 11 Jur. N. S. 560; *Yates v. Jack*, L. R. 1 Ch. 295; *Maguire v. Grattan*, 16 W. R. 1189. See also *per Jessel, M.R., in Aynsley v. Glover*, L. R. 18 Eq. at p. 553.

(p) *Radcliffe v. Duke of Portland*, 3 Giff. 702; *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Jacob v. Knight*, 3 De G. J. & S. 533; *Curriers' Company v. Corbett*, 4 De G. J. & S. 764; *Sparling v. Clarkson*, 17 W. R. 518; *Clarke v. Clark*, L. R. 1 Ch. 16; *Robson v. Whittingham*, *ib.*, 442; *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421. But see *Sayers v. Collyer*, 28 Ch. D. 103; *Holland v. Worley*, 26 Ch. D. 578; *Shelfer v. City of London Electric, etc., Co.*, [1895] 1 Ch. 287; and see cases, Chap. XX., *ante*, p. 250, as to where the damage is small.

(q) *Jackson v. Duke of Newcastle*, 3 De G. J. & S. 275. See *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.*, 6 Ch. D. 757; *Fritz v. Hobson*, 14 Ch. D. 542; *Beddall v. Maitland*, 17 Ch. D. 174; R. S. C. 1883, Ord. 36, r. 58.

when the right to relief depends mainly on damage not suffered at the time, but likely to accrue within a reasonable time, the Court will grant an injunction. (r)

(b) *Mandatory Injunction to demolish Buildings.*—The Court has power, where the building obscuring the light has been already erected, either to grant a mandatory injunction directing the building to be demolished, and compelling a defendant to restore things to the condition in which they were before he began to build, or it may award damages. Mandatory
injunction.

The Court will not order the demolition of obscuring structures after they are completed, except in cases in which extreme, or, at all events, very serious, damage will ensue from its interference being withheld, or where pecuniary compensation will not do substantial justice. (s) Only in
serious cases.

But under special circumstances such an order will be made. (t) Thus a mandatory injunction was granted to pull down a building which obstructed the plaintiff's light, where he had promptly objected, and the defendant knew he was in the wrong. (u)

The material point for consideration is, the state of the new building when the plaintiff first complains. (w)

If after receiving notice of motion for an injunction the defendant attempts to anticipate the order of the Court, by hurrying on his building before an injunction is actually granted, a mandatory injunction will be granted to pull down what he has so built, without regard to the ultimate result of the action. (x) But the plaintiff must pursue his remedy promptly. (y) Danger of
"running
up" a
building.

(c) *Measure of Damages.*—The damages are to be estimated according to the diminution of value, not only for the purposes of the occupation or business to which they are at the time of action applied, but also to which they may in future be made applicable. (z) And the character of the neighbourhood,

(r) *Dicker v. Popham*, 63 L. T. 379.

(s) *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355; *Darrell v. Pritchard*, L. R. 1 Ch. 244.

(t) *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. 219. No bar to relief that damage is complete before action, *Darrell v. Pritchard*, *supra*.

(u) *Smith v. Smith*, L. R. 20 Eq. 500; *Baxter v. Bower*, 44 L. J. Ch. 625; *Darrell v. Pritchard*, *supra*; *Younge v. Shaper*, 27 L. T. 643.

(w) *Lawrence v. Horton*, 59 L. J. Ch. 440; *Shid v. Golfrey*, W. N. 1893, 115.

(x) *Daniel v. Ferguson*, [1891] 2 L. J. Ch. 440, followed in *Van Joel v. Hornsey* (1895), 2 Ch. 774.

(y) *Lady Stanley v. Earl Shrewsbury*, L. R. 19 Eq. 616. See *Lawrence v. Austin*, 31 L. J. Ch. 598.

(z) *Moore v. Hall*, 3 Q. B. D. 178. See *ante*, p. 311, as to action by reversioner.

and the interest of the plaintiff, must be taken into consideration. (a)

(d) *Damages or Injunction*.—In all cases in which a judge has jurisdiction to entertain an application for an injunction, he may award damages either in addition to, or in substitution for, such injunction; and such damages may be assessed in such manner as the Court shall direct. (b)

Rule in *Shelfer v. City of London Electric Light Co.*

It may be stated as a good working rule, that damages may be given in substitution for an injunction, in cases where there are found in combination the four following requirements, viz. where the injury to the plaintiff's legal rights is (1) small, (2) capable of being estimated in money, (3) can be adequately compensated by money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction; (c) and there is nothing in *Colls v. Home and Colonial Stores* (d) which conflicts with this principle. (e)

All circumstances to be considered.

All the circumstances of each case will be considered in exercising the discretion. The Court will not, when the defendant's buildings would render the plaintiff's property absolutely useless to him, compel the plaintiff to sell his property out and out to the defendant, especially where the defendant has, during the progress of the action, given an undertaking to pull down, if so ordered at the trial. (f) But if the injury to the plaintiff will be less serious, and his property will remain substantially useful to him, if the defendant's buildings are permitted to continue, the Court may award damages in lieu of an injunction, and the Court will take into consideration the nature and situation of the property, e.g. the circumstance that it is situate in the centre of a large city, such as London. (g) Whether the Court has jurisdiction to give damages in lieu of an injunction for future injury is not clear. The Court of Appeal, in *Dreyfus v. Peruvian Guano*

(a) *Ib.* See *Newson v. Pender*, 27 Ch. D. 43. Where there is a covenant for quiet enjoyment after a grant of light, see *Leech v. Schweder*, L. R. 9 Ch. 463.

(b) 21 & 22 Viet. c. 27, s. 2; repealed by 46 & 47 Viet. c. 49; 36 & 37 Viet. c. 66, s. 24 (7).

(c) *Shelfer v. City of London Electric Light Co.*, [1895] 1 Ch. 287. See also *Cowper v. Laidler* (1903), 2 Ch. 337.

(d) (1904) A. C. 179, and at p. 291, *supra*.

(e) *Per* Farwell, J., in *Higgins v. Belts* (1905), 2 Ch. 210, at p. 179. See also p. 291, *supra*.

(f) *Greenwood v. Hornsey*, 33 Ch. D. 471.

(g) *Holland v. Worley*, 26 Ch. D. 578, where *Aynsley v. Glover*, L. R. 18 Eq. 544; *Krehl v. Burrell*, 7 Ch. D. 551; and *Smith v. Smith*, L. R. 20 Eq. 500, were considered. *Sayers v. Collyer*, 28 Ch. D. 103, *supra*; *Hipgrave v. Case*, 28 Ch. D. 356. See also *Allen v. Ayres*, W. N. 1884, p. 242.

Co., (*h*) expressed a clear opinion against such jurisdiction, but such damages were given in *Holland v. Worley*, (*i*) and by Kekewich, J., in *Martin v. Price*, (*k*) but the Court of Appeal held that the injunction should be granted in that case.

Where, after the hearing of an action, there is difficulty in ascertaining from the evidence the amount of injury, a surveyor is sometimes appointed to report to the Court. (*l*)

Appointment of surveyor by Court to report on injury.

SECT. VIII.—RIGHT TO PROSPECT OR PRIVACY.

The erection of a building which merely intercepts the prospect of another, even if long enjoyed, without obstructing any lights to which he may be entitled, is not actionable. (*m*) But a right to an uninterrupted prospect may be acquired under a covenant to that effect. (*n*) An injunction will not be granted to restrain the erection of a building because it injures the plaintiff by obstructing the view of his place of business. (*o*)

View of place of business.

The intrusion upon a neighbour's privacy, even by opening a new window overlooking the adjoining land, is not a ground for interference. (*p*) If a window is opened and privacy disturbed, the only remedy of the adjoining owner is to build upon his land opposite the window. (*q*) It is quite clear that a party has a right to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfere, perhaps, with his comfort. (*r*)

Privacy.

(*h*) 43 Ch. D. 316; applied in *Cooper v. Laidler* (1903), 2 Ch. 337.

(*i*) 26 Ch. D. 574.

(*k*) [1894] 1 Ch. 276.

(*l*) *Kelk v. Pearson*, L. R. 6 Ch. 809; *Baltic Co. v. Simpson*, 21 W. R. 390; *Leech v. Schweder*, 43 L. J. Ch. 493 n.

(*m*) *Knowles v. Richardson*, 1 Mod. 55; *Wells v. Ody*, 7 C. & P. 410; *Att.-Gen. v. Doughty*, 2 Ves. sen. 453. See *Aldred's Case*, 9 Coke's R. 58; *Squire v. Campbell*, 1 M. & Cr. 459.

(*n*) See *ante*, p. 228.

(*o*) See *ante*, p. 228.

(*p*) *Turner v. Spooner*, 1 Dr. & Sm. 467. See also *per* Lord Westbury, in *Tapling v. Jones*, 11 H. L. Cas. 290, *ante*, p. 289.

(*q*) *Chandler v. Thompson*, 3 Camp. 80. See 9 Rep. 58 b; *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69; *Re Penny and the South-Eastern Ry. Co.*, 7 El. & Bl. 660.

(*r*) *Per* Kindersley, V.-C., in *Turner v. Spooner*, *supra*. See, however, *per* Hall, V.-C., in *Lord Manners v. Johnson*, 1 Ch. D. at p. 680, and *ante*, p. 248, where there is a covenant not to build beyond a certain line.

CHAPTER XXIV.

PARTY WALLS AND FENCES.

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SECT. I.—DEFINITION OF A PARTY WALL.

THE most ordinary, and the primary, meaning of the term “party wall” is, a wall of which the two adjoining owners are tenants in common. (*a*)

Term used
in different
senses.

The words “party wall” may be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*, (*b*) and *Cubitt v. Porter*, (*c*) that is the most common and the primary meaning of the term; secondly, a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts v. Hawkins*; (*d*) thirdly, a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; (*e*) and lastly, a wall divided longitudinally into

(*a*) As to party walls under the London Building Act, see Sect. V., p. 326, *post*.

(*b*) 1 M. & R. 404.

(*c*) 2 M. & R. 267; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

(*d*) 5 Taunt. 20.

(*e*) The term was so used in some of the Building Acts which are now repealed. See *Aerated Bread Co. v. Shepherd*, 13 T. L. R. 311.

two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety. (*f*)

A wall may be a party wall up to such part of its height as belongs in common to two buildings, and cease to be a party wall, and be the separate property of one of the owners, for the rest of its height; (*g*) or party wall in part of its length, namely, for such distance as it is used on both sides by the respective owners, and separate property of one of the owners in other part. (*h*)

It may be here mentioned that the ownership of a building partly overhanging other premises does not give the owner a right to raise the overhanging part of his building. (*i*)

It was held in an old case (*k*) that the builder of a house on a new foundation was not entitled to build his side or flank wall one-half on his own ground and the other half on the vacant ground of his neighbour, "for no man has a right to presume that his neighbour will hereafter build a house adjoining to his, and erect half of his outside wall on his neighbour's ground in consequence of such a presumption." (*l*)

SECT. II.—OWNERSHIP AND USE OF PARTY WALLS.

(1) GENERALLY.

Where it is not known under what circumstances a wall was built, the presumption is that it belongs to the two proprietors as tenants in common. (*m*) As the ownership of a wall or hedge may be proved by acts of ownership, (*n*) so the common user of a wall separating adjoining lands belonging to different owners is *prima facie* evidence that the wall, and the land on which it stands, belong to the owners of those adjoining lands, in equal

(*f*) *Per Fry, J.*, in *Watson v. Gray*, 14 Ch. D. 192. The Code Napoléon contains many provisions concerning party walls; see articles 653-664.

(*g*) *Weston v. Arnold*, L. R. 8 Ch. 1084; *Knight v. Pursell*, 11 Ch. D. 412; *Watson v. Gray*, 14 Ch. D. 192; and see *Drury v. Army and Navy Auxiliary Co.* (1896), 2 Q. B. 271.

(*h*) *Knight v. Pursell*, L. R. 11 Ch. D. 412; *Mayfair Property Co. v. Johnson*, (1894) 1 Ch. 508.

(*i*) *Corbett v. Hill*, L. R. 9 Eq. 671; *Laybourn v. Gridley*, [1892] 2 Ch. 53.

(*k*) *Barlow v. Norman*, 2 Wm. Blackstone, 359.

(*l*) Cf. the London Building Act, 1894, s. 87 (6), under which, subject to the payment of compensation, the footings of a party wall may be built on the adjoining owner's land.

(*m*) *Wiltshire v. Silford*, 1 M. & R. 404; *Hutchinson v. Mains, Alc. & Nap.* 155; *Duke of Newcastle v. Clark*, 8 Tantt. 627, 628.

(*n*) *Guy v. West*, 2 Selwyn, N. P. 1297; *Marshall v. Taylor*, [1895] 1 Ch. 641.

moieties, as tenants in common. (*o*) If A. builds on B.'s wall, knowing that he is trespassing, he makes a gift of what he builds on the other wall. It is not looked on as a gift, but it is the property of the owner of the other wall. The law is the same if what is done is done by permission. Again, where a man asks for permission to build a wall on another man's wall, and there is no agreement or anything more than the permission, the result is that the wall in question becomes the wall of the person upon whose soil the other wall is. (*p*)

In a case where a man built a wall forming one side of his house on the top of a wall on his neighbour's land, it was held that he did not acquire a statutory title by possession, merely by using such wall as one side of his house. (*q*)

When presumption does not arise.

Where the precise extent of land originally belonging to each owner can be ascertained, the presumption of a tenancy in common does not arise; and if two persons have a party wall, one-half the thickness of which stands on the land of each, they are not, therefore, tenants in common of the wall, nor of the land on which it stands, although the wall was erected at their joint expense. (*r*)

Generally built on common property of both.

In general, however, party walls will be found to be built on the common property of the two, and to be the common property of both; and, in the absence of any further proof than that which is afforded by evidence of a common user, such will be presumed to be the case. (*s*)

Inscription stone in wall.

If a wall forming the end wall of a house has a stone in it with an inscription that the wall belongs to the adjoining owner, and not to the owner of the house, this effectually excludes acquisition of the wall by adverse possession. (*t*)

(2) RIGHTS OF PARTIES WHERE ONE OF TWO HOUSES IS SOLD.

It seems that where one of two houses, belonging to the same owner, and divided by a party wall, is sold, half the party wall

(*o*) *Cubitt v. Porter*, 2 M. & R. 267; *Wiltshire v. Sidford*, 1 M. & R. 404; *Standard Bank of British South America v. Stokes*, 9 Ch. D. 68.

(*p*) *Waddington v. Naylor*, 60 L. T. 480; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; and as to rights of tenants in common, see *post*, p. 323.

(*q*) See note (*p*), *supra*.

(*r*) *Matts v. Hawkins*, 5 Taunt. 20; *Taylor v. Stendall*, 7 Q. B. 634. See *Hunt v. Farris*, 19 C. B. N. S. 13. See *Murly v. McDermott*, 3 N. & P. 356, as to the effect of the description of the half-wall by abutments under the old system of pleading.

(*s*) *Stedman v. Smith*, 8 El. & Bl. 1; *Watson v. Gray*, 14 Ch. D. 192. As to licences, see p. 284.

(*t*) *Philipson v. Gibbon* L. R. 6 Ch. 428, 434.

passes as part of the house, with an easement of support on the other half, and that an easement of support for the house retained on the half of the wall conveyed is, by implication, reserved by the vendor. (u) In a case, which turned more upon a question of fact than of law, where a person had erected two houses, the pillar and portico of one overlapping the other, and sold the first, the pillar and portico were held to pass to the purchaser as part of the house sold. (w)

(3) RIGHTS AND LIABILITIES AS BETWEEN LANDLORD AND TENANT.

Where a landlord lets a house adjoining his own, and the house so let has a wall built entirely on the lessee's land intended as an external wall and not as a party wall, the landlord is not entitled to use such wall as a party wall. His doing so may be treated either as a derogation from grant or a trespass which will be restrained by injunction. (x)

An agreement for a building lease, or a building lease, usually contains an agreement, or a covenant by the lessee, either to build walls of a certain height along the boundary side of the premises demised, or to contribute a reasonable proportion of the expense of building the party and fence walls, to be used in common by the occupiers of the premises demised and the occupiers of any other houses erected, or to be erected, on any part of the building estate of the lessor. This proportion is ascertained by the architect of the lessor. (y)

Covenant as to erection of party walls.

(4) RIGHTS AND LIABILITIES AS BETWEEN JOINT OWNERS.

Either owner is justified in pulling down the portion of a wall standing on his own land, where the wall is not common property, but one half of it belongs exclusively to one owner, and the other half of it exclusively to another, although sufficient support may not be left for the portion which belongs to the adjoining owner; (z) except, of course, where there are circumstances from which a grant of an easement, creating a right of mutual support, may be

As to pulling down walls.

(u) *Weston v. Arnold*, L. R. 8 Ch. 1081. See the provisions of the Building Act, *post*, p. 514, *et seq.*

(v) *Fox v. Clarke*, L. R. 7 Q. B. 748; 9 Q. B. 565.

(x) *Betts v. Pickfords, Ltd.*, 22 T. L. R. 315. As to whether a lessee or a sub-lessee is "owner" within the meaning of the Metropolitan Building Act, see *Wigg v. Lefevre*, 8 T. L. R. 493, noted *post*, p. 480.

(y) See F. XXIX., p. 440.

(z) *Wigford v. Gull*, Cro. Eliz. 269; *Wiltshire v. Salford*, 1 M. & R. 401.

implied. (a) But if one of two owners in severalty of the two moieties of a party wall, with cross rights of easement, pulls down his own portion of the wall, he will be liable for disturbing the rights of the other. (b)

Negligence in pulling down.

And, although there is no right of support, where the person pulling down his wall proceeds so irregularly and improperly that his neighbour is subjected to more than ordinary risk, he may be liable to an action if an accident occurs. (c) Where the plaintiff and defendant, being jointly interested in the pulling down and rebuilding of a party wall between their respective houses, each appointed an agent to superintend the execution of the work, and the work was negligently done, and plaintiff's house was much injured from the want of proper support during the execution of the work, it was held that he could not maintain an action for damages against the defendant, as the blame was the common blame of both. (d) The age and condition of the property injured is merely a circumstance to be taken into consideration by the jury, in determining the question of negligence, and in assessing the proper damages. (e)

Negligence in underpinning.

In *Bradbee v. Christ's Hospital*, (f) the defendants were held liable for carelessness in underpinning a party wall between their property and the plaintiff's whereby injury occurred to the latter. It was found that the defendants conducted themselves so carelessly, negligently, and improperly in pulling down their house, and in omitting to use proper precautions in that behalf, that large quantities of bricks, mortar, etc., fell from the defendant's house into and upon the plaintiff's house, and broke his windows, skylights, etc., and occasioned other consequential damage. In these circumstances the Court held that it made no difference whether the plaintiff was owner in severalty of the half of the wall which was next his house, or whether he and the defendant were tenants in common of the whole wall; in either case the action was maintainable. (f)

Right of dominant owner.

Where there is an easement of support in a party wall, the

(a) See Chap. XXV., Sect. II. (5), p. 336, as to such easements.

(b) See Sect. II. (1), *ante*, p. 319.

(c) See *post*, p. 341, as to damage caused by negligently pulling down buildings. See also *Apperley v. Mark Patrick & Co.*, Appendix, p. 669.

(d) *Hill v. Warren*, 2 Stark. 378.

(e) *Dodd v. Holne*, 1 A. & E. 493; *Walters v. Pfeil*, M. & M. 364. See also *Gayford v. Nicholls*, 9 Exch. 708; *Davis v. Blackwall Ry. Co.*, 1 M. & Gr. 799; *Green v. Eales*, 2 Q. B. 225; *Jones v. Bird*, 5 B. & Ald. 837.

(f) *Bradbee v. Christ's Hospital*, 4 M. & Gr. 761. See also *Bower v. Peate*, 1 Q. B. D. 321; and *Falton v. Angus*, 6 A. C. 740, and *post*, p. 330 n.

owner of the dominant tenement is entitled to put any amount of weight on the wall which does not endanger its stability. (g) He cannot take from it a pilaster and girder, erected for the benefit of the adjoining house. (h)

One of two owners in severalty of two moieties of a party wall may maintain an action for injury done to his half of the wall. (i) Actions by owners in severalty.

(5) RIGHTS AND LIABILITIES OF TENANTS IN COMMON.

If one of two tenants in common of a party wall excludes the other owner entirely from his occupation of it as by destroying it or building upon it, he commits a trespass; (k) but one tenant in common cannot bring an action of trespass, or in the nature of trover, against the other, unless there has been a total destruction or conversion of the common property. (l) Building a new wall of a greater height than the previous one, is not such a total destruction of the wall. (m) A tenant in common may get an order for the partition of a party wall, vertically and longitudinally. (n) Total destruction or conversion

So an action in the nature of ejectment is maintainable, if an actual ouster of the plaintiff from the common property by the defendant be proved. (o) It may be a trespass to bore a hole through a party wall, even though the wall belongs to the person who makes the hole. (p) Ouster.

It seems that if one tenant in common has laid bricks, and built a higher wall than the previous one upon that which is the subject-matter of the tenancy in common, the other party may remove the new part of the wall. (q) Remedy where wall built higher.

g) *See Hill & Austral Society v. Jarvis*, W. N. 1871, p. 202; *Ib.*, 1872, p. 17.

(h) *Thorp v. Scruton*, W. N. 1872, p. 60.

(i) *Miles v. Hawkins*, 5 Taunt. 20.

(k) *Cobitt v. Porter*, 2 M. & R. 267; Co. Lit. 200, b.; *Hunt's Boundaries and Easements* (5th ed.), p. 256.

(l) *Stedman v. Smith*, 8 El. & Bl. 1; *Foyce v. Foyce*, Gow. 201; *Waterman v. Sepp*, 1 Lord Raym. 737; *Noye v. Reed*, 1 M. & R. 63; *Murray v. Hall*, 7 C. B. 411.

(m) *Cobitt v. Porter*, 2 M. & R. 267, *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

(n) *Mayfair Property Co. v. Johnston* 1894, 1 Ch. 508.

(o) *Trotter v. Simpson*, 5 C. & P. 51; *Murley v. McDermott*, 8 A. & E. 138; *Stedman v. Smith*, 8 El. & Bl. 1; *Jacob v. Seaward*, L. R. 4 C. P. 328. See also *Watson v. Gray*, 14 Ch. D. 192.

(p) *Wellbank v. Weatherhead*, 8 T. L. R. 243.

(q) *Stedman v. Smith*, *supra*; *Wadlington v. Naylor*, 60 L. T. 180; *Murray v. Hall*, 7 C. B. 411; *Murley v. McDermott*, 8 A. & E. 138; *Cobitt v. Porter*, *supra*; *Knight v. Purcell*, 11 Ch. D. 412 *ante*, p. 319.

Pulling down to rebuild. A tenant in common of a party wall may, however, pull down the wall for the purpose of rebuilding it, or for the purpose of repair, or for replacing an old foundation by a new one, and this even without notice to the adjoining owner. (*r*)

Intention to rebuild. It is, nevertheless, essential that the tenant who pulls it down shall have an intention to rebuild. In the absence of such an intention he is liable to an action for trespass. (*s*)

When within the area of the London Building Act. Although a co-owner of a party wall could not maintain an action at common law against the other co-owner for temporarily undermining the foundation of the wall, yet, when within the area of the London Building Act, 1894, such a work cannot be carried out if a difference arises between the building owner and the adjoining owner, except as provided by Part VIII. of that Act. (*t*)

Matters having relation to the support of walls will be dealt with in the next chapter.

(6) EXPENSES OF BUILDING A PARTY WALL.

Custom to share expense.

In *Robinson v. Thompson* (*u*) the defendant was a builder and the owner of three contiguous building sites. He sold the middle one to the plaintiff, one of the end sites to another purchaser, and retained the third for himself. The agreement for sale to the plaintiff contained a description of the property, and a plan by which it appeared that the length of the plaintiff's frontage was twenty feet. The plaintiff having built his house, the defendant built a house on his own site, making use of the gable end wall of the plaintiff's house. On account of this user the plaintiff claimed and obtained judgment for £21 7s. It was shown that the plaintiff's frontage extended to the middle of the wall only, which, being a nine-inch wall, stood $4\frac{1}{2}$ inches on his ground and $4\frac{1}{2}$ inches on the defendant's ground. It was held that a good and reasonable custom had been proved that the defendant should contribute to the expense of the wall which he used, notwithstanding that it was built half on his own land, there being nothing in the agreement to exclude the custom.

Expense of party walls

Provision is usually made in building agreements which affect

(*r*) *Per* Jessel, M.R., in *Standard Bank v. Stokes*, 9 Ch. D. 68, at p. 14.

(*s*) *Jones v. Reed* (1876), 1r. R. 10 C. L. 315. As to repairs, see Sect. III., *post*.

(*t*) See this Act, *post*, p. 514, and *Standard Bank of British South America v. Stokes*, 9 Ch. D. 68, and cases cited, p. 515.

(*u*) (1890), L. T. Jo., Vol. 89, p. 137.

the builders of houses in accordance with a common scheme, that the cost of party walls shall be shared by adjoining owners. Covenants of this kind enure for the benefit of the purchasers of such houses. on a building estate.

Where the plaintiff's vendor bought a plot of land on a building estate from a building society, and built a house on it, one of the conditions under which he purchased was that if he built a party wall, he should be reimbursed half the cost by the purchaser of the adjoining site. He then sold the house to the plaintiff. The building society subsequently sold the rest of the estate to a company, who sold a site adjoining the plaintiff's house to the defendants, under an agreement which contained a condition similar to, though not identical with, that which was imposed upon the plaintiff's vendor. In building their house the defendants made use of the plaintiff's party wall. In an action brought to recover half the price, it was held that the circumstances raised an implied contract on the part of the defendants to pay half the cost of the party wall to the plaintiff as the owner of the adjoining house, notwithstanding that the wall had, in fact, been built by the plaintiff's predecessor in title. (r)

SECT. III.—REPAIRING WALLS AND FENCES.

It has been considered doubtful how far a tenancy in common of a party wall, or fence, implies any obligation on the part of one tenant in common towards his co-tenant to repair; (y) but it is decided that one tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. (z) By one tenant in common.

As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything. The burden of repair falls upon the owner of the dominant tenement. (a) Servient owner not bound to repair.

An action for not repairing fences, whereby another party is damaged, can, in ordinary cases, be maintained only against the occupier, and not against the owner in fee who is not in possession. (b) Action for non-repair of fence.

(r) *Irving v. Turnbull* (1900), 2 Q. B. 129.

(y) *Gibbon on Dilapidations*, p. 261; *Hunt's Boundaries and Fences* (5th ed.), p. 133. See the provisions of Building Act, *post*, p. 514.

(z) *Leigh v. Dickeson*, 15 Q. B. 11, 60.

(a) *Lab. 4*, fol. 232, a; 1 *Saund.* 322, a; *Taylor v. Whitehead*, 2 *Douglas*, 749; *Ingraham v. Morecraft*, 33 *Beav.* 49. See p. 278, under "Roads," etc.

(b) *Cheatham v. Hipsden*, 4 *T. R.* 318; *Russell v. Shenton*, 3 Q. B. 419;

But the landlord may be sued instead of the tenant, where the wrong causing the damage arises from the nonfeasance or misfeasance of the landlord. (c) So, also, where the landlord has undertaken to repair the premises and neglected to do so. (d)

SECT. IV.—HEDGES.

One tenant in common of a hedge may maintain trespass against his co-tenant if the latter grabs it up; but not for a mere clipping of the hedge. (e) A covenant not to grub up trees or hedges is broken by removing them from one part of the premises to another, or by taking them away (unless they are decayed) for the purpose of planting a larger number in their stead. (f)

SECT. V.—PARTY WALLS UNDER THE LONDON BUILDING ACT.

(1) GENERALLY.

The London Building Act, 1894, contains a number of provisions relating to party walls within the county of London. It is unnecessary at this point to deal fully with these provisions, seeing that they are set out at length hereafter. The following summary may, however, be found useful. (g)

(2) DEFINITION OF A PARTY WALL.

The expression "party wall," as used in the Act, means (a) a wall forming part of a building, and used, or constructed to be used, for separation of adjoining buildings belonging to different owners, or occupied, or constructed, or adapted to be occupied by different persons; or (b) a wall forming part of a building, and

Chauntler v. Robinson, 4 Exch. 163; *Reg. v. Bucknall*, 2 Ld. Raym. 804; *Leslie v. Pounds*, 4 Taunt. 619; *Mills v. Holton*, 2 H. & N. 14.

(c) *Todd v. Flight*, 9 C. B. N. S. 377, 389.

(d) *Payne v. Rogers*, 2 H. Bl. 348. See also *Rex v. Podley*, 1 A. & E. 822.

(e) *Voyce v. Voyce*, Gow. 201; *Martyn v. Knollys*, 8 T. R. 145; *Jacobs v. Seward*, L. R. 4 C. P. 328. Where there are two adjacent fields, separated by a hedge and ditch, the ditch belongs, *prima facie*, to the owner of the field in which the hedge is, *Guy v. West*, 2 Selw. N. P. 1244; *Fowles v. Millar*, 3 Taunt. 137; *Marshall v. Taylor*, [1895] 1 Ch. 641. See *Warner v. Southworth*, 6 Connecticut Rep. 471, as to the presumption on a grant of land "bounded by a ditch or wall."

(f) *Doe d. Wetherell v. Bird*, 6 C. & P. 195; *Arthur v. Lamb*, 2 Dr. & Sm. 428.

(g) For a general summary, see *per* Collins, L.J., in *In re Stone v. Hastie* (1903), 2 K. B. 469, 470.

standing to a greater extent than the projection of the footings on lands of different owners. (*h*)

In either of the following cases (a) when a wall is, after the commencement of the London Building Act, 1894, built as a party wall in any part; or (b) where a wall, built before or after the commencement of the Act, becomes after that date a party wall in any part, it is to be deemed a *party* wall for such part of its length as is so used. (*i*) This provision is merely declaratory of the law as laid down in *Weston v. Arnold*. (*h*)

Where a building was proposed to be erected, some portions of it being of much greater height than others, and the walls dividing the higher from the lower portions were to be carried up above the roof of the lower, so as to form the outside walls of the higher, it was held on the authority of *Weston v. Arnold*, (*l*) that the wall was not a party wall at any point higher than three feet above the point at which it ceased to be a dividing wall, and that, consequently, openings might be made in it above that height. (*m*)

The expression "party structure," as used in the Act, means a "Party structure" party wall, and also a partition floor or other structure separating vertically or horizontally building storeys or rooms approached by "party wall." includes distinct staircases or separate entrances from without. (*n*)

(3) PROVISIONS OF THE LONDON BUILDING ACT WITH REGARD TO PARTY WALLS.

If a building owner desires to build a party wall on the line of junction between his house and that of an adjoining owner, he must comply with sect. 87 of the Act. The rights of a building owner in relation to party structures (including party fence walls) are set out in sect. 88. If a building owner requires to do anything to a party wall, he must serve a party wall notice on the adjoining owner, (*o*) and the adjoining owner may then serve a cross notice specifying what he requires to be done for his protection and benefit (*p*) Disputes between adjoining owners in

h London Building Act, 1894, s. 5 (16).

i *Ib.*, s. 58.

k L. R. 8 Ch. 1084.

l *Supra*.

m *Drury v. Army and Navy Supply Co.* 1895, 2 Q. B. 271. S. 54 (3) of the Act provides that an opening shall not be made in any party wall except in accordance with the provisions of the Act relating thereto.

n *Ib.*, s. 5 (20).

o S. 80 (1). For form of party wall notice, see F. XXXIX., *et seq.*, *post*, p. 420.

p S. 89.

relation to party wall notices may be settled by arbitration. (*q*) The expenses of the work are to be borne either (*a*) jointly by the building owner and the adjoining owner, if the work is for their mutual benefit, (*r*) or (*b*) wholly by the building owner. (*s*) Where a party wall is raised, the building owner may have to bear the initial expense, (*t*) but provision is made whereby the adjoining owner, if he uses the wall so raised, may have to bear part of the expenses of raising it. (*u*)

The Act contains many other provisions relating to party walls. (*w*)

(*q*) S. 91.

(*r*) S. 95 (2).

(*s*) S. 95 (2).

(*t*) S. 95 (2) (*e*).

(*u*) S. 95 (2), paragraph after (*f*).

(*w*) As to height of party walls above the roof, see s. 59; chases in party walls, s. 60; fireplace openings in party walls, s. 64 (10); openings in party walls in ordinary buildings, s. 54 (3); in large buildings, s. 77 (3); taking down and re-erection of a party wall which is partially destroyed, s. 208; bressumers in a party wall, s. 56 (4); rules as to woodwork of shop-fronts near a party wall, s. 73 (4); thickness of party wall, Sched. I., Pt. I.; closing openings in, s. 77 (4); easements affecting party walls, s. 101.

CHAPTER XXV.

THE LAW OF SUPPORT.

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SECT. I.—PRELIMINARY.

THE force of gravity causes the superincumbent land, or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to

resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight. (a)

SECT. II.—NATURE AND EXTENT OF THE RIGHT OF SUPPORT.

(1) WHEN SUPPORT IS CLAIMED FOR LAND.

Natural right to support of land.

Every owner has a right, *ex jure nature*, that his own land shall not be disturbed by the removal of the support naturally rendered by the subjacent and adjacent soil. (b)

The right to support is not a right to a particular means of support; but it is a right that the ordinary enjoyment of land shall not be interrupted, so that, until the enjoyment of the surface land is disturbed, the owner has no right to complain of the removal of minerals. (c)

Extent of support to which owner is entitled.

The extent of the land of the grantor required for the support depends on the nature of the land. If in a quarry of hard stone or marble, it may be that no adjacent support is necessary. If, on the other hand, it traverses a bed of sand or a marsh, or a loose gravelly soil, it may be that a considerable breadth of support is necessary to prevent the land from falling away upon the soil of that which is retained. The same rule applies where the land is conveyed compulsorily, under authority of an Act of Parliament,

(a) *Per* Lord Selborne in *Dalton v. Angus*, 6 App. Cas. 740.

(b) *Humphries v. Brogden*, 12 Q. B. 739; *Smart v. Morton*, 5 El. & Bl. 30; *Rowbotham v. Wilson*, 8 H. L. C. 348; *Backhouse v. Bonomi*, 9 H. L. C. 503; and cases cited in *Dalton v. Angus*, *supra*; *Bell v. Love*, 9 App. Cas. 286; *Chapman v. Duy* (No. 1), 47 L. T. 705. "In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as incident to the land itself. *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas*." *Per* Lord Selborne in *Dalton v. Angus*, 6 A. C. 740. As to right to let down surface without making compensation under an Inclosure Act, see *Gill v. Dickinson*, 5 Q. B. D. 159. As to the construction of documents giving something different from the common right, see *Davis v. Treharne*, 6 App. Cas. 460; *Mostyn v. Lancaster*, 23 Ch. D. 583; *Twylerould v. Chamber Colliery Co.*, W. N. 1892, p. 27.

(c) *Backhouse v. Bonomi*, 9 H. L. C. 503. See *post*, p. 341.

for a public work, as a railway or canal, unless qualified by the Act. (*d*)

But the support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as, in its natural undisturbed state, is sufficient to afford the requisite support. (*e*)

The natural right to support continues though houses are built, where the weight of the houses does not produce the sinking of the land, and if the land would have sunk in the same manner if no house had been erected. (*f*)

To what extent building affects natural right to support.

The damages are not necessarily nominal, merely because the injury would have been inappreciable had no buildings existed on the land, if the damage has been caused by an infraction of the plaintiff's common law right. (*g*)

The right which every landowner has to the support of his land may be prevented from arising by reservation, but the language of the instrument must be clear and unambiguous. (*h*) For, if a lessor wishes to reserve rights in derogation of his grant, he must do so in plain terms. (*i*) The strict legal right to unlimited support is frequently modified by Act of Parliament, or by private agreement. (*j*)

Right to support modified by agreement.

In certain districts, a lessor in the building lease, excepts and reserves the right of removing all minerals either lying within a fixed distance, or without restriction, making compensation for all

Reservation of minerals by lessor.

(*d*) *Calcutta Ry. Co. v. Sprot*, 2 Macq. 449; *Caledonian Ry. Co. v. Bellies*, 3 Macq. 56; *Dugdale v. Robertson*, 3 K. & J. 625; *North-Eastern Ry. Co. v. Elliott*, 30 L. J. Ch. 160; *Great Western Ry. Co. v. Bennett*, L. R. 2 H. L. 27; *Stellings v. Short*, 2 C. P. D. 572; *Fletcher v. Mayor of Birkenhead*, 22 T. L. R. 200.

(*e*) *Birmingham Corporation v. Allen*, 6 Ch. D. 284.

(*f*) *Reynolds v. Richards*, 1 H. & N. 186; *Hamer v. Knowles*, 6 H. & N. 454; *Rees v. Lee*, 9 App. Cas. 286; *Smith v. Thackeray*, L. R. 1 C. P. 564; *Wyatt v. Harrison*, 3 B. & Ad. 871.

(*g*) *Champion v. Day* (N. 1), 47 L. T. 705. And see, as to amount of damages to be allowed, *Smith v. Thackeray*, L. R. 1 C. P. 564.

(*h*) See, as to the right of landowner to the support of land, *Blackhouse v. Brown*, 9 H. L. C. 504; *Birmingham Corporation v. Allen*, 6 Ch. D. 284. See also, p. 265, as to the distinction between a reservation and an exception.

(*i*) *Mundy v. Duke of Rutland*, 23 Ch. D. 81; *Rees v. Lee*, 9 App. Cas. 283.

(*j*) See *Apfel v. Sedden*, L. R. 10 Ch. 531; *Ibid.*, L. R. 1 Ex. D. 405. See also *Harris v. Ry. Co.*, 5 M. & W. 10; *Scott v. Morton*, 5 El. & Bl. 30; *Euden v. Jeffcock*, L. R. 7 Ex. 97; *Reynolds v. Harries*, 6 El. & Bl. 613; *Robertson v. Wilson*, 8 H. L. C. 318; *Duke of Rutland v. Warkfield*, L. R. 4 H. L. 377; *Richards v. Harper*, L. R. 1 Ex. 194; *Smith v. Darby*, L. R. 7 Q. B. 716; *The Benfield L. Ry. v. The Great Iron Co.*, 3 Ex. D. 51; *Davis v. Trehearne*, 6 App. Cas. 460; *Manchester Mayor v. New Moss Colliery Co.*, 22 T. L. R. 132. And see, as to the construction of such reservations, *Hext v. Gill*, L. R. 7 Ch. 639; *Jersey v. South*, 22 Q. B. D. 555; *Bell v. Earl of Dudley*, [1895] 1 Ch. 182. See also, p. 257, *et seq.*, as to nature of restrictive covenants.

damage done to the surface, or to any building on the ground, and, in some cases, when the builder will accept such a condition, without any liability for damage. Where the owner of land reserves the minerals under the land, and the right to work them, paying compensation for all damage that may be done thereby to the buildings on the land, the grantees of the minerals, with notice of the reservation, can only work the minerals subject to the condition of paying compensation to the grantee of the land, who can maintain an action for the damage done to his buildings by the working of the mines. (*k*) Although, as a general rule, the owner of the surface has no right to the additional support necessary for the maintenance of buildings, where there is a reservation by the grantor of the minerals, (*l*) yet, if the grant is made expressly to enable the grantee to build a house on the land granted, there is then an implied grant of support, subjacent and adjacent, as if the house had already existed. (*m*)

(2) ACQUISITION OF THE RIGHT OF SUPPORT.

Support to
land in
natural
condition.

The right to support for land in its natural condition, as already explained, is a natural right. It is not, therefore, acquired by any act, but is a right incident to the ownership of land. A right, however, to let down the support to which a surface owner has a natural right may be acquired by Act of Parliament. (*n*) No right can be acquired by the owner of subsoil, either by custom (*o*) or by prescription, (*p*) to destroy the support to the surface land.

Implied
grant.

Whenever land is sold, there is an implied grant of right to support for that land by the vendor, if he reserves either the subjacent mines or the adjoining soil. The grant of right to support, under these circumstances, is additional to the natural right, and can be implied against the vendor only; but the natural right is good not only against the vendor, but against other persons in possession of the land adjacent, or the subjacent mines. (*q*)

Effect of
vendor
reserving

If the vendor, when land is sold, reserves the subjacent mines, with power to work the minerals, this reservation of itself will not

(*k*) See note (*j*), *ante*, p. 331.

(*l*) *Ib.*

(*m*) *Caledonian Ry. Co. v. Sprot*, 2 Macq. 452; *North-Eastern Ry. Co. v. Elliott*, 10 H. L. C. 333; *North-Eastern Ry. Co. v. Crossland*, 2 J. & H. 565.

(*n*) *Rowbotham v. Wilson*, 8 H. L. C. 348. And see ss. 77, 78, and 79 of the Lands and Railway Clauses Consolidation Acts, 1845.

(*o*) *Wakefield v. Duke of Buccleuch*, L. R. 4 Eq. 613; L. R. 4 H. L. 377; *Hilton v. Earl Granville*, D. & M. 614.

(*p*) *Blackett v. Bradley*, 1 B. & S. 940.

(*q*) *Goddard on Easements* (6th ed.), p. 309, and *post*, p. 334.

deprive the purchaser either of his natural right to support for his adjacent land, or of the benefit of the implied grant. (r) mines.
support for buildings.

(3) WHEN SUPPORT IS CLAIMED FOR BUILDINGS.

(a) *Generally*.—The right to support *ex jure naturæ* exists in respect of land only, and not in respect of buildings. But a right to support for buildings, both from adjacent and subjacent land, may be acquired, and, when acquired, the right is an easement. (s) Right to support for buildings.

Support to that which is artificially imposed upon land must, in each particular case, be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbours' land, which, naturally, would be free from it. (t) But the character of the rights is in each case the same, whether acquired *ex jure naturæ* or by grant. (u) The right is properly called an easement, as it was by Lord Campbell in *Humphries v. Brogden*; (w) though, when the land is in its natural state, the easement is natural and not conventional. The same distinction exists as to rights in respect of running water. The right of the riparian landowner is natural; that of the mill-owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, i.e. it must be established by prescription or grant. (x)

Support may be claimed for buildings—(1) from adjacent and subjacent soil, (2) from adjacent buildings, (3) in buildings in flats, from subjacent flats. Easements of support for buildings.

A right to support for buildings, both from the subjacent and adjacent soil, may be acquired by grant, express or implied. (y)

(b) *Express Grant*.—As to express grants, the nature and character of the right will be defined by the deed. It seems probable however, that such a document would hardly take the form of a grant, but rather of a covenant on the part of the so-called

(r) *Harris v. Ryding*, 5 M. & W. 60; *Smart v. Morton*, 5 El. & Bl. 30. See *Bell v. Love*, 9 App. Cas. 286; *Aspley v. Seddon*, L. R. 10 Ch. 394; *Ib.*, 1 Ex. D. 496. Cf. *Whitehouse v. Bayley*, 34 L. T. 93. As to lessee of mine not being liable for acts of previous tenant, see *Greenwell v. Low Beechburn Colliery Co.* (1897), 2 Q. B. 165, followed in *Hall v. Duke of Norfolk* (1900), 2 Ch. 493.

(s) See *Dalton v. Angus*, 6 A. C. 740, *post*, p. 336, as to acquiring a right of support for buildings.

(t) *Per* Lord Selborne, in *Dalton v. Angus*, 6 App. Cas. 740. See *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449.

(u) *Per* Willes, J., in *Bonomi v. Backhouse*, 1 E. B. & E. 655.

(w) 12 Q. B. 742.

(x) *Per* Lord Selborne, in *Dalton v. Angus*, *supra*.

(y) *Bonomi v. Backhouse*, 1 E. B. & E. 655; *Dalton v. Angus*, *supra*.

grantor to refrain from the commission of any act prejudicial to the stability of the dependent tenement. (z)

(c) *Implied Grant*.—Where there is no express stipulation, this right arises by implied grant, when an owner of adjoining houses and land severs the property by sale, for, in such a case, rights to support are granted by implication, by the vendor and purchasers respectively. (a) A vendor, on selling part of his property, is presumed to grant such a measure of support from the property he retains as is necessary for the property sold in its then condition, or when applied to the purpose for which the grant was expressly made; but the precise measure of such support depends upon the special circumstances of each case. (b) The damages recoverable for an interference with such support include all loss which has happened as a natural consequence of the wrongful acts, such as the expense of removing the grantee's business to other premises. (c)

If land is granted for the purpose of building a house, there is an implied warranty of support; subjacent and adjacent, from the land of the grantor, as if the house had already existed, (d) and the circumstance that the grant does not notice the intention of building is immaterial in a case where both grantor and grantee are aware of it. (e)

(d) *Implied Reservation of Support*.—Where the common owner

(z) *Banks's Law of Support*.

(a) *Richards v. Rose*, 9 Ex. 219, distinguished in *Howarth v. Armstrong*, 77 L. T. 62; *Murchie v. Black*, 19 C. B. N. S. 190. See *per* Lord Tenterden in *Peyton v. Mayor of London*, 9 B. & C. 736. See *Aspden v. Seddon*, *supra*; *Russell v. Watts*, 10 A. C. 590.

(b) *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

(c) *Ib.*

(d) *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449. See also *Caledonian Ry. Co. v. Belhaven*, 3 Macq. 56; *Dugdale v. Robertson*, 3 K. & J. 695; *N.-E. Ry. Co. v. Elliott*, 10 H. L. C. 332; *Great Western Ry. Co. v. Bennett*, L. R. 2 H. L. 27; *Siddons v. Short*, 2 C. P. D. 572.

(e) *Robinson v. Grave*, 29 L. T. 7. In *Rigby v. Bennett*, 21 Ch. D. 559, the corporation of Liverpool put up certain plots of building land for sale by auction. The purchasers were to erect buildings to the satisfaction of the corporation. No sale was effected at the auction, but afterwards one of the plots was sold to the plaintiff under the original conditions. He submitted plans showing foundations 10 feet 9 inches deep, which were approved. Afterwards, owing to the nature of the soil, he built only 8 feet 3 inches deep. The corporation surveyor inspected the foundations and raised no objection. When the plaintiff's house was nearly completed, the adjacent lot was sold to the defendant, who excavated to a depth considerably lower, and so as to endanger the plaintiff's building. It was held that the corporation, having raised no objection to the plaintiff's shallow foundation, could not themselves have excavated so as to endanger the plaintiff's building, though the plaintiff knew, when he laid his foundations, that the adjoining plot was destined to be built upon, and that the defendant could have no greater right.

By vendor.

Measure of damages.

Implied warranty of support.

Plots of building land.

of house and land first sells the land, retaining the house, the law does not seem clear whether he retains a right of support by implication or not, but apparently he does; (f) and it is clear that the easement of support would in such circumstances be an easement of necessity. As to subjacent support, where the owner of land with a house on it sells the minerals, retaining the house, and the house is let down by the mining operations, the owner of the house is entitled to damages; it was said all buildings are entitled to subjacent support, (g) and the same has been decided with regard to adjacent land. (h)

If the subsoil is granted and the surface is reserved, it is doubtful whether there is any implied reservation of an easement of support for the surface, in addition to the natural right; and accordingly all owners of property will do well to see that in making any such grant an easement is expressly reserved. (i)

c. *Draining Underground Water*.—There is nothing, at common law, to prevent the owner of land draining, though it may happen that, where a person grants land to another for building, the grantor cannot drain his adjoining land, if to do so would render the land granted less fit for building than it otherwise would have been, on the ground that the grantor would be derogating from his own grant. (k)

Where, however, the plaintiff's house was supported by a bed of wet sand, and not by a stratum of water, and it was let down by a shifting of such land caused by the defendant removing sand and water, such removal was equivalent to a removal of adjacent support afforded by earth, and the defendant was responsible. (l)

(4) PRESCRIPTIVE RIGHT TO SUPPORT FROM LAND.

A right to lateral support from adjoining land may be acquired, by twenty years' uninterrupted enjoyment, for a building proved

(f) See Chap. XXIII., p. 270, as to there being no such reservation for other easements.

(g) *Richards v. Jenkins*, 18 L. T. 437.

(h) *Shubbrook v. Tucker*, 46 L. T. 836. As to adjacent support, see *Murkie v. Black*, 19 C. B. N. S. 120.

(i) *Giffard on Easements* (6th ed.), p. 311.

(k) *Popehead v. Hodgkinson*, L. R. 1 Ex. 218. But see *Jensen v. Sutton, etc., Gas Co.* (1899), 2 Ch. 217, where Lush, M.R., expressed a doubt whether this case is an authority that under no circumstances can there be a right to support to land from underground water.

(l) *Jordan v. Sutton, Southwicks, and Drypool Gas Co.* (1899), 2 Ch. 217. As to the liability of a water company to pay compensation for subsidence

Subsoil
granted,
surface
retained.

Support
from bed of
wet sand.

to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time, where that enjoyment is peaceable, and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. (*m*)

(5) SECRET ENJOYMENT OF SUPPORT.

Enjoyment
of person
against
whom a right
of support is
claimed.

"The law favours the preservation of enjoyments acquired by the labour of one man, and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building, erected near the extremity of the owner's land, may be explained on the same principle." (*n*) The easement must have been enjoyed for twenty years before action brought under a claim of right, and after the neighbour was, or ought to have been, fully aware of the facts. (*o*)

The enjoyment of the right of support must have been open and not surreptitious. (*p*)

Knowledge
of person
against
whom a right
of support is
claimed.

Upon the questions proposed to the learned judges, in *Dalton v. Angus*, (*q*) which involved the doctrine of *clam*, i.e. secrecy of enjoyment as applied to the easement of support, there was much difference of opinion. It will, therefore, be important to see what is the nature and extent of the knowledge, or means of knowledge, which a man ought to be shown to possess, against whom a right of support for another man's building is claimed. He cannot resist, or interrupt, that of which he is wholly ignorant. (*r*)

caused by the withdrawal of support afforded to adjoining land by wet silt, see *Fletcher v. Birkenhead Corp.*, 5 L. G. R. 483.

(*m*) *Dalton v. Angus*, 6 A. C. 740.

(*n*) *Per* Lord Campbell, in *Humphries v. Brogden*, 12 Q. B. 749. See *Hide v. Thornborough*, 2 C. & K. 250; *Solomon v. Vintners' Co.*, 4 H. & N. 598; *Dugdale v. Robertson*, 3 K. & J. 695; *Hunt v. Peake*, Johns. 710; *Rogers v. Taylor*, 2 H. & N. 828.

(*o*) See *per* Alderson, B., in *Partridge v. Scott*, 3 M. & W. 230. And see now the judgments in *Dalton v. Angus*, 6 A. C. 740.

(*p*) *Dalton v. Angus*, 6 A. C. 740.

(*q*) *Supra*.

Lateral
support
presumed.

(*r*) Lord Selborne, L.C., says, in *Dalton v. Angus*, 6 A. C. 740, at p. 801: "There are some things of which all men ought to be presumed to have knowledge, and among them, I think, is the fact, that, according to the laws of nature, a building cannot stand without vertical or, ordinarily, without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of its erection. When, as in the present case, a private dwelling-house is pulled down, and a building of an entirely different character,

(6) EASEMENT OF SUPPORT WHERE HOUSES ADJOIN.

Where an easement of support is claimed by the owner of one of two adjoining houses which have not a common origin, against the owner of the other, it must be shown that the owner of the servient tenement knew, or had the means of knowing, that his house was affording support to the other. (s)

Knowledge of servient owner to be proved.

The foregoing principle, in so far as it is founded upon community of origin, appears to depend upon the common-sense principle that if two houses are built together as one, they will naturally require support one from the other. But where the structure which requires support is of such a character that the manner in which the support is given and the extent to which it is enjoyed is not obvious to every one, the doctrine of common origin will not avail the plaintiff. (t)

Limitation of the above doctrine.

(7) ACQUISITION OF THE RIGHT TO SUPPORT WHERE HOUSES BUILT TOGETHER.

Where a number of houses have been built together by one owner, so as to require and receive mutual support, there is, either by a presumed grant or by a presumed reservation, a right to mutual support, for their common protection or security, if the houses are afterwards sold and conveyed to different individuals; and if several adjoining landowners, by common consent, build their houses together, so that the house of one of them rests upon and requires the support of the adjoining house, there will be an implied grant of a right to support; and this right will continue, notwithstanding alterations in the ownership of the

such as a coach or carriage factory, with a large and massive brick pillar and chimney-stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary that he should have particular information as to those details of the internal structure of the building, on which the amount or incidence of its weight may more or less depend. If he thought it material, he might inquire into those particulars, and then if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shown to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different." See also *Lemaitre v. Davis*, 19 Ch. 11, 281.

(s) *Gately v. Martin* (1900), 2 Ir. R. 269.

(t) *Per C. A. in Union Lighterage Co. v. London Graving Dock Co.* (1902), 2 Ch. 557. But see dissenting judgment of Vaughan Williams, L.J.

Separate
walls and
foundations.

houses by sale, mortgage, devise, etc. (*u*) But if two houses are built against each other, with separate and independent walls, resting upon separate and independent foundations, so as to stand independently of each other, one has no right (apart from prescription) to support from the other. (*w*)

Duty to
take care.

But, even when no right exists, it is the duty of all persons to use due care and skill, and take reasonable precautions, in pulling down houses and walls which rest against, or are in contact with, an adjoining house or wall; and, if an injury is sustained from a neglect to exercise such care, skill, and precaution, a wrong is done, and the wrongdoer is responsible for the damage; (*x*) but there is no obligation, in the absence of statutory provision, upon the owner of the building about to be removed to shore up the other building, (*y*) or to give the owner of the other building notice of the intention to remove his own. (*z*)

No absolute
duty to
shore up.

(8) PRESCRIPTIVE RIGHT TO SUPPORT FROM BUILDINGS.

Where ancient buildings, belonging to different owners, adjoin each other, there is a right of support from the building as well as from the land. (*a*)

It was also held, in the last-mentioned case, that this right of support could be claimed under the provisions of sect. 2 of the Prescription Act. (*b*) But an easement of support has not been enjoyed "as of right," within the above section, if the claimant has been liable, under a covenant, to perform an act which is inconsistent with the existence of such an easement. And where

(*u*) *Richards v. Rose*, 9 Ex. 221; and see *per* Cockburn, C.J., in *Angus v. Dalton*, 3 Q. B. D. at p. 116; *Goddard on Easements* (6th ed.), p. 331. See also *Walters v. Pfiel*, 1 M. & W. 362; *Dodd v. Holme*, 1 A. & E. 493; *Massey v. Goyder*, 4 C. & P. 161; *Chadwick v. Trower*, 6 Bing. N. C. 1; *Lemaitre v. Davis*, 19 Ch. D. 281; *Tone v. Preston*, 24 Ch. D. 739.

(*w*) *Solomon v. Vintners' Company*, 4 H. & N. 598; *Peyton v. Mayor of London*, 9 B. & C. 736; *sed quære*, whether this decision is not overruled by *Angus v. Dalton*, *supra*: *quare* whether there is sufficient reason why a distinction should be made between support derived from adjacent land and support derived from a contiguous building. See also *Kempston v. Butler*, 12 Ir. C. L. R. 516.

(*x*) *Addison on Torts* (7th ed.), p. 379. *Chadwick v. Trower*, *supra*; *Walters v. Pfiel*, *supra*; *Davis v. London and Blackwall Ry. Co.*, 1 M. & G. 799; *ante*, p. 205. As to repair of the damage, see *Taylor v. Stendall*, 7 Q. B. 634.

(*y*) *Peyton v. Mayor, etc., of London*, 9 B. & C. 725.

(*z*) *Chadwick v. Trower*, *supra*.

(*a*) *Lemaitre v. Davis*, 19 Ch. D. 281; *Brown v. Windsor*, 1 C. & J. 20; and *as to subjacent support*, see *Bell v. Love*, 9 App. Cas. 286.

(*b*) 2 & 3 Will. IV. c. 71. See the section, p. 274; see also the *dictum* of Lord Selborne in *Dalton v. Angus*, in 6 A. C. 740, at p. 801, *ante*, p. 336 *n*.

a building stands upon land, as to a portion of which land the party claiming the easement admits, for instance, under a deed, that at any time, upon a certain notice, he is bound to do something which is inconsistent with the continuance of the building, the claim is not of right, and the easement is not claimable. (c)

No opinion was expressed in *Dalton v. Angus* (d) as to the distinction taken in *Solomon v. Vintners' Company*, (e) where it was decided that the right could not be acquired when there were intervening properties. Where there are intervening buildings.

When the natural right to support for land is limited by Act of Parliament, or otherwise, a similarly limited right to support for houses erected on the surface can alone be acquired by prescription. (f) Limited support for buildings.

(9) REPAIR OF SUPPORTING BUILDING.

The law seems to be clear that the dominant owner may enter the servient tenement and do the necessary repairs, and that the servient owner is under no obligation to do them. (g) There is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a substantial manner, his only duty being to prevent it from being a nuisance. (h) Obligation and right to repair a supporting building.

(10) EXTINCTION OF THE RIGHT OF SUPPORT.

When an artificial weight has been placed on land, so as to impose a greater pressure on the subjacent or adjacent soil than that which previously existed, the servient owner may be sued if he interferes with the natural right to support to which the dominant owner was entitled; and compensation may also be recovered for the injury caused to the buildings, as consequential damage, if the newly erected buildings were not the primary cause of the sinking, that is, if the sinking would have occurred when an excavation was made, even though no buildings had been Effect of increased pressure on easement of support.

(c) *Tate v. Preston*, 21 Ch. D. 739.

(d) *Supra*.

(e) 4 H. & N. 585. See, however, now *Leadbetter v. Davis*, *supra*.

(f) *Bushell v. Wilson*, 6 E. & B. 593.

(g) *Powell v. Ryfoft*, 1 Wm. Sm. at p. 565 (ed. 1871).

(h) *Colebrook v. Girdlers' Company*, 1 Q. B. D. 234; *Hamilton v. Ventry of St. George, Hammer Spire*, L. R. 9 Q. B. 42; *Gerrard v. Cooke*, 2 B. & P. N. R. 109. See *Humphreys v. Cousins*, 2 C. P. D. 229; *Chambliss v. Robinson*, 1 Exch. 163; *Stockport Highway Bd. v. Grant*, 51 L. J. Q. B. 357.

erected. (i) For the natural right to support is not destroyed, or even suspended, under such circumstances.

Increasing weight of an ancient building.

The point, whether the fact of increasing the weight of an ancient building has the effect of depriving the owner of his right to that degree of support to which he was entitled before he increased the weight, does not appear yet to have been decided. It would seem, however, that, as the effect of building on land does not, under the circumstances above mentioned, suspend the natural right to support, there would only be a similar result from the increase of the weight of an ancient building, and the owner would not lose his right to sue for any injury caused, unless it arose through the additional weight of the house. (k)

Pulling down for purpose of repair.

When a house is pulled down for the purpose of repair, this does not cause the loss of any easement attached to it, if it be accompanied by an intention, acted upon within a reasonable time, of rebuilding it. (l)

SECT. III.—REMEDIES FOR DISTURBANCE OF SUPPORT.

(1) GENERALLY.

Works endangering, or infringing, a right to an easement of support, (m) or infringing a natural right of support, (n) will be restrained by injunction; (o) or, where injury has been caused, an action can be brought for damages, or for both an injunction and damages. (p)

When there is a right to sue for disturbance of support, in the case of natural rights.

In the case of the natural right of support for the soil, the dominant owner is entitled to sue the adjoining owner if he, without justification, removes, or excavates on, his own land in a manner which causes damage to the land of the dominant owner, although the work has not been conducted negligently, or in a way which is contrary to the custom of the country where the land is situated. (q)

As regards buildings, when a right by prescription or grant has

(i) See *ante*, p. 330, and *Stroyan v. Knowles*, 6 H. & N. 454; *Brown v. Robins*, 4 H. & N. 186. But cf. *Smith v. Thackerah*, L. R. 1 C. P. 564.

(k) *Goddard* (6th ed.), p. 506. See *Dalton v. Angus*, 4 Q. B. D. 162; 6 App. Cas. 740; *Murchie v. Black*, *supra*.

(l) *Luttrell's Case*, 4 Rep. 86.

(m) *North-Eastern Ry. Co. v. Elliott*, 10 H. L. C. 333; *Siddons v. Short*, 2 C. P. D. 572; *Dalton v. Angus*, *supra*.

(n) *Hunt v. Peake*, 29 L. J. Ch. 785.

(o) See Chap. XXIII, Sect. VII. (4) (a), p. 312, as to when an interlocutory injunction will be granted, and as to injunctions at the hearing.

(p) See *ib.* (d), p. 316, as to this. *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

(q) *Humphries v. Brogden*, 12 Q. B. 739; *Brown v. Robins*, 4 H. & N. 186.

been acquired, and can be proved, by the dominant owner, he can sue for damage sustained by any unjustifiable disturbance of his right, in a similar way to the owner of a natural right to support. (r) But although this must be taken to be the rule, yet where a person who has no right in the adjacent or subjacent land, i.e. a trespasser, removes support, and causes damage to buildings, the owner of the damaged buildings can bring an action against such person, even though he has not acquired any right to support. (s) And, as before pointed out, even where there is no actual right to support for a house, the owner of an adjoining house is liable for negligence if he do not exercise due precaution and skill in pulling down or altering his adjoining property. (t) In such case negligence is the gist of the action; where there is a right to support, negligence is immaterial. (u)

—In the case of buildings.

Trespasser removing support.

(2) WHEN THE CAUSE OF ACTION ARISES.

No cause of action accrues for the mere excavation by the defendant in his own land, so long as it causes no damage to the plaintiff, but the cause of action arises when the actual damage first occurs. (r) The right of the person whose land was interfered with is to the ordinary enjoyment of his land, and until that is interfered with, he has no cause of action for damages. (v)

But where there has been a disturbance of a right to support from adjacent land, and, in addition to existing damage, future damage may occur, only the damage actually accrued can be recovered in the action, and any further damage must be recovered when it actually occurred, in a subsequent action. (x) But depreciation in the market value of the property caused by the risk of

Prospective damage.

(r) See *Dalton v. Angus*, *supra*, p. 336 n.; *Lemaitre v. Davis*, *supra*, p. 338. See *Murchie v. Black*, 19 C. B. N. S. 190, as to where disturbance of the right to support may be justified.

(s) *Jeffries v. Williams*, 5 Exch. 782; *Bibby v. Carter*, 4 H. & N. 153.

(t) *Ante*, pp. 205, 321.

(u) See note (i), *supra*. As to a second subsidence, see *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. D. 125.

(v) *Bonomi v. Backhouse*, E. B. & E. 646; and 9 H. L. C. 503. Cf. *Kensit v. G. E. Ry. Co.*, 27 Ch. D. 122. See also *Roberts v. Reid*, 16 East, 215; *Gillen v. Biddington*, 1 C. & P. 541, as to the time to sue if it is limited from the commission of an act.

(w) *Per Lord Cranworth in Bonomi v. Backhouse, supra.*

(x) See *Lamb v. Walker*, 3 Q. B. D. 389, where the decision was to the contrary effect, but the case has since been overruled by *Mitchell v. Darley Main Colliery Co., supra*. See *Shadwell v. Hutchinson*, 2 B. & Ad. 97. But see *Fritz v. Hobson*, 14 Ch. D. 542; *Redhall v. Maitland*, 17 Ch. D. 174; B. S. C. 1883, Ord. 36, r. 58. See *ante*, p. 331, as to damages for interference with natural right.

future subsidence is recoverable as existing damage. (y) On a second subsidence, a fresh cause of action accrues to the plaintiff, whose right to maintain the action is not, therefore, barred by the Statute of Limitations. (z)

When right
to injunction
accrues.

Where the plaintiff, entitled to a right of support, can make out a reasonable and probable case of injury to his land from the working of the subjacent or adjacent soil, and can show a reasonable probability of damage, an injunction can be obtained against the person threatening to continue the working or excavation, although there is no actual existing damage to his land. (a)

SECT. IV.—BUILDING IN FLATS, AND THE LAW OF SUPPORT. (b)

A builder frequently erects a building, making each story, or flat, into a separate dwelling, and sells or lets the different stories of the house to different persons; in which case there is an implied grant, to every purchaser or lessee, of all such adjacent and subjacent support as may be necessary for each respective story or flat. Although there is no express authority on the point, it is submitted that upper owners would have implied power to enter any lower flat and do necessary repairs for themselves. (c) Lord Selborne, in *Dalton v. Angus*, (d) when referring to the general principles as to an implied grant of support, said, if a building is divided into floors or flats, separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or flat is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself.

Rights of
upper owners.

Where rooms
let on a floor.

A lease of rooms on a floor is a lease of a separate dwelling, and includes the outer wall so far as it is solely appropriate to the rooms let. (e)

Obligation to
repair.

It has been said, in an old case, that “where I have a chamber below, and another has a chamber above mine, as they have here

(y) *Tunncliffe v. West Leigh Colliery Co., Ltd.* (1906) 2 Ch. 22.

(z) *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. D. 125.

(a) *Siddons v. Short*, 2 C. P. D. 572; *Rigby v. Bennett*, 21 Ch. D. 559; *Mundy v. Duke of Rutland*, 23 Ch. D. 81. See as to when an interlocutory injunction will be granted, and as to the injunctions at the hearing, p. 245. As to mandatory injunctions, see *ante*, pp. 244, 245.

(b) As to covenants relating to building in flats, see Chap. XIX., Sect. II. (2), *ante*, p. 230.

(c) *Goddard* (6th ed.), p. 376.

(d) 6 App. Cas. at p. 793; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449.

(e) *Carlisle Café Co. v. Muse*, 67 L. J. Ch. 53.

in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below, by the reparation of the principal timber, for the salvation of his chamber above." (*f*) But this case was doubted by Lord Holt, (*g*) and there appears to be no authority to oppose to his opinion, that such an obligation could only exist when specially imposed.

SECT. V.—RIGHTS OF OWNERS AND TENANTS OF FLATS. (*h*)

Where the owner retains possession of the staircase in a building which is sublet in flats, he is liable for accidents to strangers, who use the staircase for the purpose of access to the flats, arising from the defective state of repair of the staircase. (*i*) As to his liability to a tenant, see *Irwin v. Hedges*. (*k*)

A covenant by a lessor of flats to employ a resident porter cannot be enforced by specific performance. (*l*)

In the absence of express agreement in a tenancy of a flat, servants of the tenant may use the lift, although objected to by other tenants. (*m*)

Where the plaintiff occupied the ground floor and the defendant the upper floor of the same building, and the defendant's employés, without his knowledge, were in the habit of emptying tea-leaves into a sink leading from his premises to a pipe, and in consequence an overflow occurred, the pipe being choked, the defendant was liable in damages. (*n*) For other cases of interference with the enjoyment of one flat by the mode of user of another, see *Jenkins v. Jackson*. (*o*) and *Robinson v. Kilvert*. (*p*)

(*f*) *Atterton v. Kellw.* 28, 11, 1; *Atterton*, 11 Mod. 8. As to the duty of landlord to repair of common stairway in building including distinct tenements, see *Long v. Mearns*, 37 Amer. R. 295 (U. S.). See also *Pomfret v. Rice*, 1 S. & F. 322.

(*g*) See *Tenant v. Goldstein*, 6 M. L. 314. See *Caledonian Ry. Co. v. Sprat*, 2 M. L. 412. In France, houses are usually built in flats; see, therefore, as to the French law, C. d. Civ. liv. ii. tit. 4, art. 664.

(*h*) See generally *Becke's Law relating to Flats*. As to covenants relating to flats, see Chap. XIX., Sect. II. (2), *note*, p. 230.

(*i*) *Muler v. Hedges*, [1893] 2 Q. B. 177.

(*k*) 9 Q. B. 1180.

(*l*) *Ryan v. Mutual Tenants Westminster Chambers Association*, [1893] 1 C. L. 116.

(*m*) *Proctor v. Meir*, 5 T. L. R. 682.

(*n*) *Abelson v. Brockman*, 51 J. P. 112.

(*o*) 40 Ch. D. 71.

(*p*) 41 Ch. D. 82.

CHAPTER XXVI.

GAS, ELECTRICITY, AND WATER.

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SECT. I.—PRELIMINARY.

BUILDERS and building owners must needs pay some attention to the conditions under which gas, electricity, and water may be supplied to houses; and in laying out an estate for building the fact that provision can be made for the supply of these commodities often serves to enhance the value of the undertaking. In these circumstances it has been thought proper to deal with some of the rights of consumers in their dealing with the local authority or company which is supplying, gas, electricity, or water.

SECT. II.—GAS.

(1) ACTS REGULATING THE SUPPLY OF GAS.

The following is a list of the principal statutory provisions which relate to the supply of gas:—

- (1) Gasworks Clauses Act, 1847 (10 Vict. c. 15).
- (2) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41).
- (3) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66).
- (4) Sale of Gas Amendment Act, 1860 (23 & 24 Vict. c. 146).
- (5) Sale of Gas (Scotland) Act, 1864 (27 & 28 Vict. c. 96).
- (6) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125).
- (7) Metropolis Gas Act Amendment Act, 1861 (24 & 25 Vict. c. 79).
- (8) The Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.).
- (9) The Gas Light and Coke Company Act, 1876 (39 & 40 Vict. c. cccxxv.).
- (10) Gas Light and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.). (*a*)
- (11) Metropolis Gas (Prepayment Meter) Act, 1900 (63 & 64 Vict. c. cclxxii.).

(2) POWER OF COMPANY TO LAY MAINS AND PIPES.

A company incorporated under a special Act or a provisional order has extensive powers to open and break up all public streets within its limits. The company is not subject to the consent of the road authority, but they must do as little damage as may be in the execution of their powers, that is, in excavating the ground to lay pipes, or to erect pillars or lamps or other works, and must always make compensation for any damage which may be done by the execution of the works. (*b*)

These powers, however, cannot be exercised, except under very special circumstances, in any private roads or lands; neither can any building be utilised for the purpose of placing any pipe or other work into, through, or against it, without the consent both of the owners and occupiers, unless it be for purposes of maintenance and repair of pipes, or where the works have been previously there existent. This prohibition is as operative against

(*a*) See also the Gas and Waterworks Facilities Acts, 1870 (33 & 34 Vict. c. 70); the Gas and Waterworks Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89); and as to particular companies, see also City of London Gas Act, 1868; the South Metropolitan Gaslight and Coke Co.'s Acts, 1869 and 1876; Imperial Gas Act, 1869; and the South Metropolitan Gas Act, 1900, and the regulations and rules made thereunder by the Local Government Board and the Board of Trade respectively.

(*b*) See ss. 6-12 of the Gasworks Clauses Act, 1847, *post*. As to laying pipes in the streets of the metropolis, see the Metropolis Gas Act, 1860, *supra*. As to taking up pavements, see *London and Blackwall Ry. Co. v. Limehouse*, 25 L. J. Ch. 164. See cases in *Michael and Will's Gas and Water* (5th ed.), p. 20.

a local authority, supplying gas within its district, as it is binding on a private company. (e) A local board cannot fix a gas lamp to a private house without leave. (d) The roads in all cases must be thoroughly reinstated, and kept in good order and condition for a minimum period of three months, and if the road continue to subside, then for a period of twelve months, if it be so long necessary. (e)

Failure to reinstate a road may involve an action for damages, if the jury find that a nuisance has been occasioned. (f)

Right to
demand
supply to
new houses.

Now, by virtue of sect. 11 of the Gasworks Clauses Act, 1871, all persons having premises within twenty-five yards of any of the pipes of the company, or such other distance as may be prescribed, may, under the conditions there mentioned, demand a supply, with the prescribed pressure; also a meter to measure the quantity of gas used. But the company may demand security for the supply before affording it or providing the meter, such security being either matter of special agreement, or as prescribed by the special Act, or, in case of disagreement, being settled by justices. (g)

Cost of
new pipes
on owner's
premises, etc.

The cost of so much of any pipe, for the supply of gas to any owner or occupier, as may be laid upon the property of such owner or in the possession of such occupier, and of so much of any such pipe as may be laid for a greater distance than thirty feet from any pipe of the undertakers, although not on such property, must be defrayed by such owner or occupier. (h)

Gas companies' lia-

Incorporated gas companies cannot be made liable for any acts

(e) *Thompson v. Sunderland Gas Co.*, 2 Ex. D. 429; *Selby v. The Crystal Palace District Gas Co.*, 30 Beav. 606.

(d) *Meek v. Langdon*, 37 L. T. Newsp. 181.

(e) See s. 10 of the Gasworks Clauses Act, 1847.

(f) *Goodson v. Sunbury Consumers Gas Co.*, 75 L. T. 251.

(g) The other provisions of this section are as follows:—

Every owner or occupier of premises requiring a supply of gas shall:

Serve a notice upon the undertakers at their office, specifying the premises in respect of which such supply is required, and the day (not being an earlier day than a reasonable time after the date of the service of such notice) upon which such supply is required to commence;

Enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of gas for a period of at least two years, of such an amount that the rent payable for the same shall not be less than twenty pounds per centum per annum on the outlay incurred by the undertakers in providing any pipe to be provided by them for the purpose of such supply; and

Give to the undertakers (if required by them so to do) security for the payment to them of all moneys which may become due to them by such owner or occupier in respect of any pipe to be furnished by the undertakers and in respect of gas to be supplied by them.

See s. 150 of the Public Health Act, 1875, *post*, p. 642.

(h) S. 11 of the Gasworks Clauses Act, 1871. See also previous note.

done within the compass of their parliamentary authority, without negligence, whether such acts are done by them or by contractors employed by them. In any claim naturally or necessarily arising from loss accruing to any person by reason of the exercise of the powers of a parliamentary company, compensation, and not damages, must be sought by the person injured. But unauthorised companies, doing work in the public streets or roads, although with the consent of the road authority, will be held liable for any misfeasance on the part of their contractor or employes.⁽ⁱ⁾ See also cases cited in relation to water companies at p. 358, *post*.

SECT. III.—ELECTRICITY.

(1) ACTS REGULATING THE SUPPLY OF ELECTRICITY.

The following is a list of the Acts which affect the supply of electricity:—

- (1) Electric Lighting Act, 1882 (45 & 46 Vict. c. 56).
- (2) Electric Lighting Act, 1888 (51 & 52 Vict. c. 12).
- (3) Electric Light (Scotland) Act, 1890 (53 & 54 Vict. c. 13).
- (4) London Overhead Wires Act, 1891 (54 & 55 Vict. c. 76).
- (5) Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19).
- (6) Electric Lighting (Scotland) Act, 1902 (2 Edw. 7, c. 35).

(2) GENERAL CONDITIONS OF SUPPLY.

Electricity is usually supplied either by the local authority or some private company acting under the authority of a provisional order confirmed by Act of Parliament, subject to and in accordance with the provisions and restrictions of the Electric Lighting Act, 1882,^(k) and of any rules made by the Board of Trade in pursuance of that Act, and of any licence, order, or special Act authorising or affecting their undertaking, and for the purpose of supplying electricity, the undertakers^(l) may acquire such

⁽ⁱ⁾ See *Dutton v. Angus*, 6 A. C. 740; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. & J. Ap. 93; *Wheeler v. Council of Owners of Public Works*, L. R. 1 H. L. 93; *Gray v. Pullen*, 32 L. J. Q. B. 160; *Knight v. For*, 5 Ex. 721; *Penny v. Walsden U. D. C.* (1899), 2 Q. B. 72, and at p. 209, *ante*; *Hardaker v. Idle U. D. C.* (1896), 1 Q. B. 315, and at p. 209, *ante*; *The Snaik* (1899), P. 71; *Hill v. Tottenham U. D. C.*, 79 L. T. 495; *Holliday v. National Telephone Co.* (1899), 2 Q. B. 392. But see *Scott v. Manchester (Mayor, etc.)*, 2 H. & N. 201.

^(k) 45 & 46 Vict. c. 56.

^(l) This phrase will be used throughout this section to denote the local authority or the company, as the case may be.

lands by agreement, construct such works, acquire such licences for the use of any patented or protected processes, inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply. (*m*)

In order to enable the undertakers to carry out the objects of their provisional order, those sections of the Gasworks Clauses Act, 1847, and the Gasworks Clauses Act, 1871, which relate to the breaking up of streets for the purpose of laying pipes, are incorporated with the Electric Lighting Act, 1882, and are to be read as if "gas" meant "electricity," and as if pipe meant "electric line." (*n*)

Private streets, courtyards, etc., cannot, however, be broken up unless with the consent of the person, company, or other body responsible for the repair of the same, or unless there are special powers conferred upon the undertakers in this behalf. (*o*)

(3) OBLIGATION TO SUPPLY ELECTRICITY.

Where a supply of electricity is provided in any part of an area for private purposes, then, except in so far as is otherwise provided by the terms of the licence, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply. (*p*) As a rule, the provisional order only requires the undertakers to lay down mains in specified streets, and to lay other mains after a requisition in that behalf has been served upon them. (*q*)

(*m*) Electric Lighting Act, 1882, s. 10.

(*n*) *Ib.*, s. 12. See p. 345, *ante*.

(*o*) *Ib.*, s. 13.

(*p*) *Ib.*, s. 19.

(*q*) It is provided by s. 21 (1) of the Schedule to the Electric Lighting (Clauses) Act, 1899 (which is usually incorporated with every provisional order), as follows: "The undertakers shall, within a period of two years after the commencement of the special order, lay down suitable and sufficient distributing mains for the purposes of general supply throughout every street or part of a street specified in that behalf in the special order, and shall thereafter maintain those mains. (2) In addition to the mains hereinbefore specified the undertakers shall at any time after the expiration of 18 months after the commencement of the special order lay down suitable and sufficient distributing mains for the purposes of general supply throughout every other street or part of a street within the area of supply, upon being required to do so in manner provided by the special order."

S. 24 (1), which relates to the requisition, provides that: "Any requisition

Upon a requisition being made, the undertakers may decline to ^{Guarantee.} be bound by it unless the persons by whom it is signed bind themselves to take, or guarantee that there shall be taken, a supply of energy for a period of three years at least, of such amount as will at the rates of charge for the time being charged by the undertakers produce annually such reasonable sum as is specified by the undertakers in the notice. (r) The Board of Trade has power to control the amount which may be thus specified by the undertaker. (s)

(4) DUTY OF UNDERTAKERS TO GRANT A SUPPLY.

While, as has been pointed out, the undertakers are under ^{No undue} obligation to supply electricity, they must not, in making any ^{preference.} agreements for a supply, show any undue preference (t) to any local authority, company, or person. Subject to this, they may make such charges for the supply as may be agreed not exceeding the limits of price imposed by or in pursuance of their provisional order. (u) They cannot prescribe any particular form of lamp or burner; but a consumer must not use any lamp or burner which is likely to interfere with the supply to other persons. (v)

A consumer, however, cannot always have a supply laid on ^{Conditions} merely upon demand. After serving a notice specifying the ^{upon which} premises, the maximum power required and the day upon which ^{supply} the supply is required to commence, the intending consumer must enter into a written contract if required by the undertakers, to receive and pay for a supply of energy for a period of at least two years, of such an amount that the payments to be made for the supply at the rate of charge for the time being charged by the undertakers for a supply of energy to ordinary consumers within the area of supply shall not be less than 20 per cent. per annum on the outlay incurred by the undertakers in providing any electrical lines required to be provided for the purposes of the

requiring the undertakers to lay down distributing mains for the purposes of general supply throughout any street or part of a street may be made by six or more owners or occupiers of premises along that street or part of a street, or where the local authority are not themselves the undertakers and have the control and management of the public lamps in that street or part of a street by the local authority."

(r) Electric Lighting (Clauses) Act, 1899 (Schol.), s. 25 (1).

(s) *Ib.*

(t) As to what constitutes "an undue preference," see *Metropolitan E. S. Co. v. Ginder* (1901), 2 Ch. 799.

(u) Electric Lighting Act, 1882, s. 20.

(v) *Ib.*, s. 18.

supply; and if required by the undertakers, must also give security. (*x*) It is the practice of companies and local authorities supplying electricity to require intending consumers to enter into a contract. (*y*)

(5) MEASUREMENT OF SUPPLY.

Provisional orders usually provide that the undertakers may charge for energy supplied by them to any ordinary consumer (otherwise than by agreement):—(*a*) By the actual amount of energy so supplied; or (*b*) by the electrical quantity contained in such supply; or (*c*) by such other method as may for the time being be approved by the Board of Trade. (*z*)

Meters.

Supply is, as a general rule, measured and paid for according to the register of a meter which is hired out to the consumer by the undertakers. Elaborate provision is made in the Electric Lighting (Clauses) Act, 1899, with regard to meters. (*a*) The undertakers are under obligation to supply meters if required to do so. (*b*)

(6) RECOVERY OF CHARGES.

If any consumer neglect to pay any charge for electricity or any other sum due to the undertakers in respect of the supply of electricity, the undertakers may cut off the supply, and may discontinue the supply until the arrears, etc., are paid. (*c*)

(7) REGULATIONS TO SECURE THE SAFETY OF THE PUBLIC.

In accordance with their powers in that behalf, the Board of Trade in 1895 (*d*) passed a series of regulations under the Electric Lighting Acts with a view to securing the safety of the public. These are too long to be referred to in detail. They provide (*inter alia*) for the maximum pressure of supply at a consumer's terminals; the size of conductors; insulation; use of transformers; support and height of aerial lines; electric lines other than aerial lines;

(*x*) Electric Lighting (Clauses) Act, 1899 (Sched.), s. 27.

(*y*) See *Husey v. London Electric Supply Corp.* (1902), 1 Ch. 411.

(*z*) Electric Lighting (Clauses) Act, 1899 (Sched.), s. 31.

(*a*) See ss. 49–59.

(*b*) *Ib.*, s. 52.

(*c*) Electric Lighting Act, 1832, s. 21. As to the liability of an incoming tenant, see Gasworks Clauses Act, 1871, s. 39, which is incorporated with the Electric Lighting Act. See also *Paterson v. Gas Light and Coke Co.* (1896), 2 Ch. 476; *Husey v. Gas Light and Coke Co.*, 18 T. L. R. 299.

(*d*) In so far as they relate to pressure of supply, they were modified in 1901.

street boxes; transformers and transforming stations; and for the erection and treatment of electric lines and apparatus on consumers' premises.

(8) PRIVATE SUPPLY OF ELECTRICITY.

While electricity is usually supplied in accordance with the terms of a provisional order, there is nothing to prohibit a man from generating electricity and granting a supply to his neighbours upon any terms which may be arranged between them.

Subject to compliance with certain regulations of the Board of Trade, (e) which provide for maximum pressure, insulation, the use of aerial lines, etc., a private person may supply electricity upon any terms he chooses; and this whether there is a provisional order in operation in his district or no. He may even send his wires across a highway if (a) they are suspended at such a height that they do not interfere with the traffic; (b) the soil of the highway is vested in the owners on either side who give their consent to the suspension of the wires. (f) The operations of a person who is privately supplying electricity may, however, be limited by the fact that he cannot uproot the surface of a highway for the purpose of laying his mains.

(9) WIRES ACROSS PRIVATE LANDS.

The foregoing observations with regard to the use of overhead wires are subject to the reservation that in London overhead wires are subject to special legislation (London Overhead Wires Act, 1891). (g) Again, it is competent for urban authorities, who have adopted the Public Health Acts Amendment Act, 1890, (h) to from time to time make, alter, and repeal by-laws for the prevention of danger or obstruction to the public from posts, wires, etc., along or across any street. The Act, however, does not extend to any works of any undertakers within the meaning of the Electric Lighting Acts, 1882 to 1888, to which the provisions of those Acts apply. (i) Apart from statute, it has been held that to stretch wires across private land is a trespass which will be restrained. (k)

(e) See regulations under s. 4 of the Electric Lighting Act, 1888, made by the Board of Trade in 1897.

(f) See *Fitchley Electric Lighting Co. v. Fitchley T. D. C.* (1902) 1 Ch. 866.

(g) 54 & 55 Vict. c. lxxvii.

(h) 53 & 54 Vict. c. 59.

(i) Public Health Act Amendment Act, 1891, s. 15.

(k) In the case of *Long v. National Telephone Co.*, *Times*, December 13, 1897, it appeared that the plaintiff occupied a house in London, and that the defendants, who carried on their business under a licence from the Postmaster General,

(10) ATTACHMENT OF WIRES, ETC., TO BUILDINGS.

The Electric Lighting Acts do not specifically refer to the placing of lines in such a position as to interfere with buildings; but it is provided, in effect, by the Gasworks Clauses Act, 1847, s. 7 (which is incorporated with the Electric Lighting Act, 1882), that nothing in the Act of 1882 shall authorise the laying, placing of a line into, through, or against any building, without the consent of the owners or occupiers. (*l*)

It has been held that certain arches used as cellars, under the street adjoining the plaintiff's premises, were buildings within the meaning of the above section. (*m*)

A telephone company having placed wires on the roofs of houses and passed them diagonally across a street, the local authority took proceedings to obtain an injunction. It was found at the trial that there was no danger and no nuisance. The streets were vested in the local authority under sect. 96 of the Metropolis Management Act, 1855. An application by the local authority for an injunction to restrain the telephone company from allowing their wires to remain in this position was refused. (*n*)

(11) NUISANCES CAUSED BY ELECTRICAL UNDERTAKERS.

Noise and
vibration.

In view of the fact that electrical machinery is often noisy, and that undertakers cannot carry out their obligations unless they

carried their wires over his house, without touching his house, and without any post or standard being fixed upon the roof. It was stated that about 150 separate wires and three cables containing 100 wires were so carried over the plaintiff's house. The plaintiff brought an action for damages for trespass, and also for an injunction for the removal of the wires. The defendant company, in resisting an application for an interim injunction, urged that some of the wires had been over the house for 13 years, and that the plaintiff had only been in occupation of it for a short time; and that there was no danger to the plaintiff's house in allowing the wires to remain until the trial. An injunction was granted by Mr. Justice Day, whose decision was affirmed by the Court of Appeal. If this is the law as regards telephones, it may be taken that the suspension of any wires bearing a current of electricity above a house may be restrained by an injunction.

(*l*) See p. 345, *ante*. S. 7 contains the proviso that "the undertakers may at any time enter upon and lay, or place any new line in the place of any existing pipe in any land wherein a line has already been lawfully laid down or placed in pursuance of an Act of Parliament, and may repair or alter any line so laid down."

(*m*) *Thompson v. Sunderland Gas Co.*, 2 Ex. 429. See also *Selby v. Crystal Palace District Gas Co.*, 31 L. J. Ch. 595.

(*n*) *Wandsworth District Bd. of W. v. United Telephone Co.*, 13 Q. B. D. 904.

have a generating station, it may become necessary to consider how far they can be held liable for nuisance.

It is provided by the Electric Lighting (Clauses) Act, 1899, (*o*) that "nothing in this order shall exonerate the undertakers from any indictment, action or other proceedings for nuisance in the event of any nuisance being caused by them." This provision has been strictly construed adversely to the supply companies and authorities, who may be restrained from carrying on their business in such a manner as to create a nuisance. (*p*)

SECT. IV.—WATER.

(1) ACTS, ETC., REGULATING THE SUPPLY OF WATER.

- (1) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).
- (2) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93).
- (3) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84).
- (4) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113).
- (5) Gas and Waterworks Facilities Act, 1870 (33 & 34 Vict. c. 70).
- (6) Gas and Waterworks Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89).
- (7) Local Government Board Regulations under above Acts of 1870 and 1873.
- (8) Board of Trade Rules under the above Acts of 1870 and 1873.
- (9) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25).
- (10) Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34).
- (11) Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21).
- (12) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37).
- (13) London Water Act, 1892 (55 & 56 Vict. c. cxxx.).
- (14) Metropolis Water Act, 1897 (60 & 61 Vict. c. 56).
- (15) Metropolis Water Act, 1899 (62 Vict. c. 7).
- (16) Metropolis Water Act, 1902 (2 Edw. 7, c. 41). (*q*)

(2) POWER TO LAY PIPES, ETC.

For the purpose of laying pipes, companies, authorised by a Power of special Act, are empowered to open and break up the soil and companies

(*o*) Schedule, s. 79. This Schedule, as already pointed out, is incorporated with every provisional order.

(*p*) *Shelfer v. City of London Electric Lighting Co.* (1895), 1 Ch. 287.

(*q*) See also the Acts referred to in note (*q*) at p. 345, *supra*.

under special
Acts to lay
pipes, etc.

pavement of the several streets within the limits of the special Act, and to open and break up sewers, drains, or tunnels within or under the same, and to lay down pipes, conduits, service pipes, and other works and engines, and from time to time to repair, alter, or remove the same. (*r*)

The undertakers are, however, not authorised to lay down any pipe, or other work, in any land not dedicated to public use, without the consent of the owners and occupiers thereof; but the undertakers may at any time enter upon, and lay any new pipe in the place of an existing pipe in, any land wherein any pipe has been already lawfully laid down in pursuance of the Act of 1847, or the special Act, or any other Act of Parliament, and may repair or alter any pipe so laid down. (*s*)

(3) RIGHT TO DEMAND SUPPLY OF WATER TO HOUSES.

Supply of
water to
houses.

Where owners and occupiers have laid down communication pipes, and paid or tendered the water rate payable in respect thereof, they are entitled to demand a sufficient supply of water for domestic purposes. (*t*) If an owner or occupier desires to have water from the waterworks brought into his premises, he is empowered by the Act of 1847, upon paying or tendering the portion of water rate in respect of such premises, by that or the special Act directed to be paid in advance, and having first obtained the consent of the owners and occupiers thereof, to open the ground between the pipes of the company and his premises, and lay any leaden or other pipes from such premises to communicate with the pipes of the undertakers. Such pipes must be of a strength and material approved of by the company, and fourteen days' notice must be given to the company, before beginning to lay any such pipes. (*u*)

(*r*) S. 28 of the Waterworks Clauses Act, 1847. As to the right apart from statutory powers, see *Goodson v. Richardson*, L. R. 9 Ch. 221; *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 453.

(*s*) *Ib.*, s. 29.

(*t*) S. 53 of the Waterworks Clauses Act, 1847. As to rates being payable according to the annual value of the premises, and "annual value" meaning "net annual value," as defined by the Parochial Assessments Act, 1836 (6 & 7 Will. IV. c. 96, s. 1), see the case of *Dobbs v. Grand Junction Waterworks Co.*, 9 App. Cas. 49.

(*u*) S. 48 of the Waterworks Clauses Act, 1847. As to the special provision as to service pipes to houses not exceeding £10 in annual value, see ss. 48, *et seq.*, of this Act.

(4) WATER FOR DOMESTIC PURPOSES.

The phrases "domestic use" and "domestic purpose" have not been defined in any Act, and their meaning has given rise to much litigation. "The phrase 'domestic use' may be defined roughly to include all the water that the occupiers of a house or building in which they dwell use for the health, comfort, and enjoyment of themselves, apart from any trade or business purpose." (r) It has been held to include the supply of water for a man's horse and carriage; (w) for domestic brewing and washing; (x) for a work-house, (y) the inmates being regarded as one family; for a bath fixed in a man's house, although the special Act excluded from the definition of supply for domestic purposes supply "for baths, wash-houses, or public purposes," the Court being of opinion that "baths" in the context meant "public baths." (z) It has also been held to include a supply to a boarding house, although "domestic purposes," according to the defendant company's Act, were not to include a supply of water "for any trade manufacture or concern;" (a) and to a pauper school supported by guardians, although the carrying on of such school is a "business" within the meaning of sect. 12 of the Waterworks Clauses Act, 1863. (b)

Supply to
boarding
house.

The supply of water for a swimming bath at a school carried on under a charitable scheme, has, however, been held to be a supply for the business of the school and not for domestic purposes within the meaning of sect. 12 of the Waterworks Clauses Act, 1863. (c)

(5) CONNECTING WITH COMPANY'S PIPES.

The communication between the service pipes and the company's pipes must be made under the superintendence of their surveyor, and two days' notice of the hour and day when such connection is

(r) *Per Jessel, M.R.*, in *Low v. Lambeth Waterworks Co.*, unrep.; but see *Michael and Will's Law of Gas and Water* (5th ed.), p. 312.

(w) *Busby v. Chesterfield Waterworks Co.*, E. B. & E. 176.

(x) *Wilts and Berks Canal Co. v. Swindon Waterworks Co.*, L. R. 2 Ch. 457.

(y) *Liskeard Union v. Liskeard Waterworks Co.*, 7 Q. B. D. 505.

(z) *Weaver v. Cardiff Corporation*, 48 L. T. 906.

(a) *Pidgeon v. Great Yarmouth Waterworks Co.*, 18 T. L. R. 97.

(b) *South West, etc., Water Co. v. St. Marylebone Guardians* (1901), 2 K. B. 174. "Although that which is carried on upon the premises is a business, it is, in my opinion, perfectly consistent that in business premises water may be wanted for domestic purposes. The question is what is the character of the purpose, not what is the character of the place of user." *Ib.*, per Buckley, J., at p. 180 in the L. R. See also *N. E. County School v. Barnard Castle U. D. C.* (1902), 2 Ch. 746.

(c) *Barnard Castle U. D. C. v. Wilson* (1902), 2 Ch. 746.

Bore of
pipes.

to be made must be given to the company; and any dispute as to the manner of the communication of the pipes is to be determined by two justices, or, in Scotland, by the sheriff. (*d*) The bore of any such service pipes must not exceed the prescribed limits, and, in the absence of special provisions, must not exceed half an inch, unless with the consent of the company. (*e*)

Removal of
service pipes.

Any person, who either has laid down service pipes, or has become the proprietor of them, is entitled to remove the same at any time, after giving six days' notice in writing to the company; but he must make compensation to the company for any injury or damage to their pipes or works caused by such removal. (*f*)

Right of
owner to
have his pipes
connected.

Where the builder and owner of a row of houses laid down communication pipes for the supply of water to the houses from the main of a waterworks company, which had been incorporated by special Act incorporating the Waterworks Clauses Act, 1847, the pipes were laid down with the approval of the company. The company afterwards refused to make the connection between the pipes and the main, and the owner thereupon lawfully made the connection, which was then immediately cut off by the company. It was held that the owner was entitled to make the connection; that the company had committed a trespass; and that there was nothing in sects. 43 and 53 of the Waterworks Clauses Act, 1847, which disabled the plaintiff from bringing an action for trespass. (*g*)

Power of
owners, etc.,
to break up
pavements.

Any owner or occupier is entitled to open or break up so much of the pavement of any street as shall be between the pipe of the company and his house, building, or premises, and any sewer or drain therein, for the purpose whether of laying, or of removing, such service pipes, "doing as little damage as may be, and making compensation for any damage done in the execution of any such work." (*h*) Every such owner or occupier, desiring to break up the pavement of any street, or any sewer or drain therein, is subject to the same necessity of giving previous notice, and to the same control, restriction, and obligations, in and during the time of breaking

(*d*) Waterworks Clauses Act, 1847, s. 49.

(*e*) *Ib.*, s. 50.

(*f*) *Ib.*, s. 51. If any one remove such pipes without giving the necessary notice to the company, he will incur a penalty of £5 to the company over and above the damage which he may be found liable to pay in any action at law at the suit of the company for the damage done to their pipes and works. *Ib.*

(*g*) *Gale v. Rhymney Water Co.*, 67 J. P. 430.

(*h*) Waterworks Clauses Act, 1847, s. 52. See *Glover v. East London Waterworks Co.*, 16 W. R. 310; *Reg. v. East and West India Dock Ry. Co.*, 22 L. J. Q. B. 380.

up the same, and also reinstating the same, and to the same penalties for any delay in regard thereto, as the company are subject to, by virtue of the Act of 1847, or the special Act. (i)

(6) MEASUREMENT OF WATER, ETC.

If, by the special Act, it be provided that the water to be supplied by the company need not be constantly laid on under pressure, every person supplied with water must, subject to the provisions of sect. 54 of the Waterworks Clauses Act, 1847, (k) provide a proper cistern, with a ball and stop-cock in the pipe bringing the water from the works into the cistern, and keep the same in good repair. Cisterns and cocks must be provided.

If the undertakers are authorised by the special Act to supply water by measure, they may let for hire to consumers a meter, or instrument for measuring the quantity consumed, along with the necessary pipes and apparatus, for such remuneration in money as may be agreed, which will be recoverable in the same manner as water rates. (l) The undertakers' officers may enter any house, building, or lands to, through, or into which water is supplied by them by measure, in order to inspect the meters, pipes, etc., and for ascertaining the quantity supplied, or removing the water-pipes, etc. (m) Supply by meter.

(7) WATER COMPANY'S LIABILITY FOR DAMAGE.

The general rule as to the liability of waterworks companies, having parliamentary powers, in respect of damage caused by their operations, is, shortly, that the authorities managing the

(i) *Ib.*

(k) See also ss. 55, 56, and 57 of this Act. See also the provisions on this subject in the Waterworks Clauses Act, 1863; s. 26 of the Metropolis Water Act, 1852, and s. 17 of the Metropolis Water Act, 1871. Special powers are also sometimes included in the special Acts.

(l) S. 14 of Waterworks Clauses Act, 1863. The meters, pipes, etc., are not to be subject to distress (or, in Scotland, to the landlord's hypothec) for rent, or to be attached or taken in execution under legal process, or in pursuance of any adjudication or order in bankruptcy or other legal proceedings against or affecting the consumer, or the occupier or owner of the premises. *Ib.* Where the waterworks are in the hands of a local authority, see ss. 58-60 of the Public Health Act, 1875. See *Sheffield Waterworks Co. v. Bingham*, 25 Ch. D. 433; *Sheffield Waterworks Co. v. Carter*, 8 Q. B. D. 632.

(m) S. 15 of Waterworks Clauses Act, 1863. Any one hindering such officers becomes liable to a penalty not exceeding £5. This power of entry is to be exercised only between 10 a.m. and 4 p.m., unless with the consent of a justice, or, in Scotland, of the sheriff. *Ib.*

water are not liable to an action for its escape, though caused by them, unless they exceed their powers, or are negligent in the execution of them; though the party injured may be entitled to compensation, if the Act so provides. (n)

But if by a reasonable exercise of the powers, either given by statute to the company, or which they have at common law, the damage can be prevented, the company may be guilty of negligence, and therefore liable. (o) The principle of *Geddis v. Bann Reservoir* was thus described by Lindley, M.R.: (p) "The defendants flooded the plaintiff's land, and said, in effect, that they could not help it. The answer was that they could help it if they kept a stream, into which they poured water, free from obstruction by mud, which they could do if they chose."

(n) *Gale* (5th ed.), p. 450. See *Cracknell v. Mayor, etc., of Thetford*, L. R. 4 C. P. 629. The authorities are fully discussed in *Geddis v. Proprietors of Bann Reservoir*, 3 A. C. 430. See also *Managers of Metropolitan Asylum District v. Hill*, 6 App. Cas. 193; *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418; and the cases referred to in *Michael and Will on Gas and Water* (5th ed.), p. 245.

(o) *Geddis v. Bann Reservoir*, 3 A. C. 430.

(p) *Southwark and Vauxhall Water Co. v. Wandsworth District B. W.* (1898), 2 Ch., at p. 608.

CHAPTER XXVII.

LIABILITY TO PAY RATES, TAXES, OUTGOINGS, ETC.

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SECT. I.—PRELIMINARY.

OF the covenants which occur in leases, those which relate to the payment of taxes and assessments are of great importance. The question frequently arises whether, under a general covenant to pay rates, duties, etc., the tenant is made liable to defray expenses of paving, sewers, drains, etc., constructed, or ordered to be

constructed, by local authorities. Again, the question whether landlord or tenant is liable to defray the cost of providing means of escape in case of fire, frequently arises in connection with this class of covenant.

§ SECT. II.—COVENANTS RELATING TO OUTGOINGS, ETC.

(1) GENERAL TYPE OF COVENANT.

The usual form of covenant which provides that the tenant shall “bear, pay, and discharge all rates, taxes, and assessments which may be assessed or imposed in respect of the demised premises,” applies to assessments, generally speaking, of a recurring nature such as land tax, (a) and rent-charge payable in respect of enfranchised copyholds. (b) Assessments of an extraordinary nature, *i.e.* those imposed in respect of permanent improvements to land, may also be imposed upon the tenant by apt words in the covenant. (c)

(2) EXPENSES IN RESPECT OF WHICH THE QUESTION OF LIABILITY MAY ARISE.

The following is a list of expenses, etc., the liability for which has been discussed in relation to covenants to pay rates, taxes, outgoings, etc.:—

(i) *Paving Expenses*.—(a) Expenses of paving imposed on landlord by a local Act; (d) incurred under the 25 & 26 Vict. c. 102, s. 96; (e) the Public Health Act, 1875, (f) and under the Metropolitan Paving Acts; (g) (b) expense of paving a yard upon premises let from year to year. (h) Liability for expenses incurred pursuant to the Private Street Works Act, 1892, has also been considered. (i)

(ii) *Drainage and Sewerage Expenses*.—Expense of abating (a) a nuisance under sect. 94 of the Public Health Act, 1875; (k) (b) a

(a) Under 38 Geo. 3, c. 5.

(b) Under 57 & 58 Vict. c. 46, ss. 8, 17, 27. See *Foa on Landlord and Tenant* (3rd ed.), p. 169.

(c) For a list of the words which are generally used, see p. 430, *post*.

(d) *Payne v. Burridge*, 12 M. & W. 727.

(e) *Allum v. Dickinson*, 9 Q. B. D. 632.

(f) *Bayliss v. Jiggins* (1898), 2 Q. B. 315; *Weld v. Clayton-le-Moors* (1902), 86 L. T. 584.

(g) *Aldridge v. Ferne*, 17 Q. B. D. 212.

(h) *Valpy v. St. Leonard's Wharf*, 67 J. P. 402. And see also *Wix v. Rutson* (1899), 1 Q. B. 474; *Gardner v. Furness Ry. Co.* (1883), 47 J. P. 232.

(i) *Surtees v. Woodhouse* (1903), 1 K. B. 396; *Stock v. Meakin* (1900), 1 Ch. 683; *Lumby v. Faupel* (1904), 68 J. P. 265.

(k) *Lyon v. Greenhow*, 8 T. L. R. 457.

nuisance caused by a defective privy; (l) (c) a nuisance arising during tenant's holding over; (m) and (d) expense of abating a nuisance by laying a new drain in accordance with a notice under the Public Health (London) Act, 1891; (n) expenses of constructing a sewer; (o) expense of providing a supply of water for a w.c.; (p) expense of drainage works required to be done by the local authority; (q) expense of reconstructing a drain pursuant to the Metropolitan Management Act, 1855, s. 85; (r) expenses of sewerage and paving a street; (s) expenses of connecting a drain with a sewer; (t) and expense of a drain made pursuant to the Public Health Act, 1875, s. 96. (u)

(iii) *Miscellaneous Expenses*. — Expense of building party walls; (w) expenses of doing works in connection with a theatre pursuant to the Metropolitan Building Act, 1878, s. 11; (x) expenses of complying with the Factory and Workshop Act, 1891, s. 7 (2), as to provision of means of escape in case of fire; (y) expenses incurred upon structural alterations necessary to make an underground bakehouse comply with sect. 101 of the Factory Act, 1901; (z) expenses of pulling down a building declared to be a dangerous structure; (u) and expenses payable by a lessor for works done by a local authority on his failure to do works in pursuance of a duty imposed on him by statute. (b)

(iv) *Expenses incurred under the London Building Act, 1905*. — The London Building Act, 1905, imposes upon the owner, as defined by sect. 6 (1) (i) (c) of that Act, certain liabilities in respect of the provision of means of escape in case of fire. These liabilities

(l) *Foulger v. Arding* (1902), 1 K. B. 700; *George v. Coates* (1903), 88 L. T. 48; *Antil v. Godwin* (1899), 63 J. B. 441.

(m) *Harris v. Hickman* (1904), 1 K. B. 13.

(n) *Brett v. Rogers* (1897), 1 Q. B. 525.

(o) *Home and Colonial Stores v. Todd*, 63 L. T. 829.

(p) *Valpy v. St. Leonard's Wharf*, 67 J. P. 402.

(q) *Sweet v. Senger*, 2 C. B. N. S. 119.

(r) *Farlow v. Stevenson* (1900), 1 Ch. 128.

(s) *Hartley v. Hudson*, 4 C. P. D. 367.

(t) *Crosse v. Raw*, L. R. 9 Ex. 209.

(u) *Build v. Marshall*, 5 C. P. D. 481. And see further as to drainage expenses, *George v. Coates*, 88 L. T. 48; *Re Warriner* (1903), 2 Ch. 367.

(w) *Southall v. Leadbetter*, 3 T. R. 458.

(x) *Re Robertson and Thorne*, 47 J. P. 566.

(y) *Horner v. Franklin* (1904), 2 K. B. 877; *Arding v. Economic Printing and Publishing Co.* (1899), 79 L. T. 622.

(z) *Goldstein v. Hollingsworth* (1904), 2 K. B. 579; *Morris v. Beal* (1904), 2 K. B. 585; *Stuckey v. Hoake* (1906), 22 T. L. R. 508.

(a) *Tubbs v. Wynne* (1897), 1 Q. B. 74.

(b) *Tidswell v. Whitworth*, L. R. 2 C. P. 326; 36 L. J. C. P. 103.

(c) See *post*, p. 559.

are further discussed in the notes to that Act; (*d*) but it is to be observed that by sect. 20, (*c*) the expenses to be borne by the owners may be apportioned amongst "all the several persons entitled to any estate or interest in the building as appears to the Court to be just and equitable in the circumstances of the case, regard being had to the terms of any lease or contract affecting such building." Whenever the liabilities of landlord and tenant under that Act form the subject of discussion, the terms of covenant in the lease must be carefully considered.

(3) COVENANTS CONTAINING WORDS UNDER WHICH THE TENANT HAS BEEN HELD LIABLE.

i) "Duties." Where the covenant contained the word "duties" the tenant was held liable to pay the expenses of paving imposed by a local Act on the landlord, (*f*) and also the expense of drainage works required by the local authority. (*g*)

Where a lessee covenanted to pay the land tax and all other taxes, rates, *duties*, etc., "imposed on or in respect of the demised premises," he was held bound to defray the cost incurred by the landlord in laying new drains in accordance with a notice to abate a nuisance under the Public Health (London) Act, 1891, (*h*) reliance being placed on the word "duties." Under a similar covenant a tenant has been held liable to reconstruct a drain pursuant to the Metropolis Management Act, 1855, s. 85. (*i*)

(ii) "Imposed on the landlord."

A covenant "to pay and discharge all taxes, rates, duties, assessments, etc., taxed and *imposed on the landlord* or tenant of the premises in respect thereof," entitles the landlord to recover from the tenant the expense of paving required by the local authority. In this case the words in italics were much relied on. (*k*) A covenant to pay "all rates, taxes, etc., which now are or may be *charged* or

(*d*) See *post*, p. 559, *et seq.*

(*e*) See *post*, p. 567.

(*f*) *Payne v. Burridge*, 12 M. & W. 727, followed in *Brett v. Rogers* (1897), 1 Q. B. 525.

(*g*) *Sweet v. Seager*, 2 C. B. N. S. 119. See *Hurst v. Hurst*, 4 Exch. 571; *Watson v. Atkins*, 3 B. & Ald. 647; *Graham v. Wade*, 16 East, 29.

(*h*) *Brett v. Rogers* (1897), 1 Q. B. 525.

(*i*) *Farlow v. Stevenson* (1900), 1 Ch. 128, distinguishing *Tidswell v. Whitworth*, L. R. 2 C. P. 326. See also as to drains, *George v. Coates*, 88 L. T. 48; *Re Warriner* (1903), 2 Ch. 367.

(*k*) *Thompson v. Lapworth*, L. R. 3 C. P. 149, followed in *Wix v. Rutson* (1899), 1 Q. B. 474. See *Bird v. Elwes*, L. R. 3 Ex. 225.

assessed upon the premises or upon any person in respect thereof," includes the expense of sewerage and paving the street in which the premises were situated. (m)

A covenant "to pay the sewers rate . . . and all other taxes, rates, assessments, and outgoings, which should be charged, assessed, or imposed upon the demised premises, or on the landlord or tenant in respect thereof," includes the expenses of making a drain which was ordered by the sewer authority in order to connect the demised premises with their sewer; although the landlord, as "owner," might, in the absence of the special arrangement, have been liable for the same. In that case reliance was placed upon the words "outgoing . . . charged," and also upon the words "upon the landlord." (n) And, again, a covenant "to bear, pay, and discharge all taxes, rates, duties, and assessments imposed on the demised premises or on the landlord or tenant in respect thereof," includes the expense of a drain (o) which had been made in pursuance of the Public Health Act, 1875. (p)

A lessee who covenants to pay "all existing and future taxes, etc., and outgoings of every description for the time being payable either by the landlord or tenant in respect of the said premises" is liable to pay the proportion of the cost of paving the street, under 25 & 26 Vict. c. 102, s. 96. Such a payment is an "outgoing," (q) payable by the lessee even if the lease be but for three years. (r)

The term "outgoings" is at least as strong as the term "duties," which is relied upon in some of the cases, while "assessments" only applies to rates, etc., of a temporary or recurring nature, and not to sums in the nature of a capital outlay. (s)

Where the covenant under consideration contained the word

(m) *Hartley v. Hudson*, 4 C. P. D. 367; but see *Baylis v. Jiggins* (1898), 2 Q. B. 315, *post*, p. 366. See *Direct Spanish Telegraph Co. v. Shepherd*, 13 Q. B. D. 202. See also *Waller v. Andrews*, 3 M. & W. 312; *Mildley v. Coppock*, 4 Ex. D. 309. See further as paying expenses having to be borne by the tenant, *Wells v. Clayton-le-Moors* (1901), 86 L. T. 584.

(n) *Crosse v. Rice*, L. R. 9 Ex. 209, followed in *Gardner v. Furness Ry. Co.*, 47 J. P. 232. See *post*, Part III.; *Acton v. Crosby*, 28 Ch. D. 431; *Aldridge v. Ferne*, 17 Q. B. D. 212.

(o) *Budd v. Marshall*, 5 C. P. D. 481, Brett, L.J., *dissentient*, but saying that he would have agreed if the word "outgoings" had been used.

(p) S. 96. See *post*, Part III. With respect to the expense of building party walls under a general covenant as to rates, taxes, etc., see *Southall v. Leadbetter*, 3 T. R. 458; *Boardman v. Per*, 8 T. R. 214, as to lessor's liability; and *Barrett v. Duke of Bedford*, 8 T. R. 603, as to tenant's liability. See the cases cited under the London Building Act, 1894, *post*, p. 514.

(q) *Aldridge v. Ferne*, *supra*.

(r) *Batchelor v. Bigger*, 60 L. T. 416.

(s) *Per Grove and Stephen, J.J.*, in *Aldridge v. Ferne*, *supra*.

(iii) "Outgoings charged on the landlord."

(iv) "Outgoings."

"outgoings," the tenant was held bound to defray the cost of pulling down buildings which had been declared to be dangerous structures; (*t*) and the expense of abating a nuisance. (*u*)

It has been held in the King's Bench (*w*) that the term "outgoings" includes the expense of complying with the requirements of the Factory and Workshop Act, 1891, s. 7, sub-s. 2, as to means of escape in case of fire, but that these expenses must be recovered in the County Court. (*x*) The Court of Appeal expressed no opinion as to whether the expenses were outgoings or not. (*y*)

(v) "Impositions and outgoings."

Expenditure upon structural alterations necessary to make an underground bakehouse comply with sect. 101 of the Factory Act, 1901, comes within the expression "impositions and outgoings" in a tenant's covenant; (*z*) and even, it seems, within the expression "outgoings; (*a*) and the tenant may be compelled to pay, although the work has been done by the landlord after the date of a magistrate's order apportioning the expense between the landlord and tenant. (*b*)

Where a lessee covenanted "to pay and discharge all taxes, rates, including sewers, main drainage, assessments, and impositions whatsoever, which now are or which at any time or times hereafter during the term be taxed, rated, etc., assessed, charged, or imposed upon or in respect of the said premises or any part thereof on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever," and there was no covenant to repair, it was held that the tenant was bound to pay the cost of abating a nuisance caused by a defective privy, (*c*) and (*per* Collins, L.J.) that "outgoings" would cover such expenditure.

A similar liability was imposed upon a tenant who had agreed to pay all "outgoings in respect of the premises," although the house was only let for a period of three years, and the rent was disproportionate to the expenditure. (*d*)

(*t*) *Tubbs v. Wynne* (1897), 1 Q. B. 74, applied in *Barsht v. Tagg* (1900), 1 Ch. 231. And see further as to outgoings, *Mile End Old Town Vestry v. Whiteby* (1898), 78 L. T. 80.

(*u*) *Antil v. Godwin* (1899), 63 J. P. 441.

(*w*) *Horner v. Franklin* (1904), 2 K. B. 877.

(*x*) See, now, Factory Act, 1901, s. 14.

(*y*) (1905) 1 K. B. 479. See also *Arding v. Economic Printing Co.* (1899), 79 L. T. 622.

(*z*) *Goldstein v. Hollingsworth* (1904), 2 K. B. 579.

(*a*) *Morris v. Beal* (1904), 2 K. B. 385.

(*b*) *Stuckley v. Hooke* (1905), 3 L. G. R. 633.

(*c*) *Foulger v. Arding* (1902), 1 K. B. 700, followed in *George v. Coates* (1903), 88 L. T. 48.

(*d*) *Stockdale v. Ascherberg* (1904), 1 K. B. 447; *Brayshaw v. Minnis* (1903), 2 Ch. 367. See also *Harris v. Hickman* (1904), 1 K. B. 13, *post*, p. 367.

Where a cottage was let from year to year at a rent of £20, it was held that while a covenant to pay "outgoings" did not oblige the tenant to pave a yard at a cost of £58, it did oblige him to furnish a supply of water to a w.c. as required by the sanitary authority, such an expense being within the reasonable contemplation of the parties. (e)

The expenses incurred in repairing a drain by order of the sanitary authority under the Public Health (London) Act, 1891, are within a covenant to "pay, etc., all land tax, etc., and all other rates, taxes, assessment charges, or impositions whatsoever, parliamentary, parochial, or otherwise, taxed, charged, assessed, or imposed upon the demised premises or on the lessor for or in respect of the premises." (f)

(vi) Miscellaneous covenants.

(4) COVENANTS CONTAINING WORDS UNDER WHICH THE TENANT HAS BEEN HELD NOT LIABLE.

It is clearly settled that the words "assessments and impositions," especially when coupled with the words "in respect of the demised premises," will not, in the case of a covenant by a tenant, include the expenses of the performance of a duty imposed on the lessor, or sums payable by a lessor for works done by a local authority, on his failure to do works in pursuance of a duty imposed on him by Act of Parliament. (g) Although this case has been distinguished from the majority of the cases in favour of the liability of the tenant, and also on the ground that the local Act contained no saving clause as to contracts between landlord and tenant, (h) it has been followed in a case (i) where the covenant was to pay "all, and all manner of taxes, rates, charges, assessments, and impositions whatsoever then, or at any times during the term, to be charged, assessed, or imposed on the demised premises or in respect thereof." A covenant to pay "all rates, taxes, and assessments which now are, or during the said term shall be, imposed or assessed on the said premises or the landlord, or tenant in respect

(i) "Assessments and impositions."

(e) *Valpy v. St. Leonard's Wharf Co.*, 67 J. P. 402.

(f) *Smith v. Robinson*, [1893] 2 Q. B. 53; *Melhado v. Woodcock*, 9 T. L. R. 48.

(g) *Tidswell v. Whitworth*, L. R. 2 C. P. 326, distinguishing *Sweet v. Seager*, *supra*.

(h) See s. 104 of the Public Health Act, 1875, and s. 23 of 32 & 33 Vict. c. 102.

(i) *Rawlins v. Briggs*, 3 C. P. D. 368, distinguishing *Thompson v. Lapworth*, L. R. 3 C. P. 149. This case and *Tidswell v. Whitworth*, L. R. 2 C. P. 326, were followed in *Hill v. Edwards*, W. N. 1885, p. 32, where "impositions" was held to be the governing word.

thereof," does not include the cost of abating a nuisance under sect. 94 of the Public Health Act, 1875. (*k*)

(ii) "Imposed upon the demised premises, or upon or payable by the tenant in respect thereof."

So, in *Allum v. Dickenson* (*l*) a covenant to pay all rates and assessments imposed upon the demised premises, which were in the metropolitan district, or upon or payable by the occupier or tenant in respect thereof, does not include the expenses of paving the new street under 25 & 26 Viet. c. 102, s. 96. (*m*) And, again, such a covenant does not include the expenses of constructing a sewer. (*n*)

(iii) "Rates, taxes, etc."

Where the covenant provided that the tenant should pay "all rates, taxes, and assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises, or the landlords or tenants in respect thereof, by authority of parliament or otherwise except the landlord's property tax," the tenant was held not liable for paving expenses under the Public Health Act, 1875, "rates, taxes, etc.," not extending to paving expenses. (*o*)

(iv) Covenant held to include expenses under Private Street Works Act.

Where expenses under the Private Street Works Act, 1892, had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, but were not payable until after that date, it was held that such expenses were not payable by a tenant who covenanted "that he would during the term pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the demised premises;" (*p*) and this decision holds good whether the word used is "outgoings" or "assessments." (*q*)

(5) EFFECT OF LENGTH OF TERM UPON THE COVENANT.

Where a tenant, having a three years' lease of a house at £70 a year, covenanted to pay all outgoings whatsoever in respect of the premises, and to keep the inside in repair; and at the termination of the lease he held over; and an expense of £70 1s. 6d. was incurred by the landlord in abating a nuisance that had arisen during such holding over, it was held that the tenant was not

(*k*) *Lyon v. Greenhow*, 8 T. L. R. 457.

(*l*) 9 Q. B. D. 622. See the Act, *post*, Part III.

(*m*) See, too, *Wilkinson v. Collyer*, 13 Q. B. D. 1. See *post*, Part III., for the Acts.

(*n*) *Home and Colonial Stores v. Todd*, 63 L. T. 829; 7 T. L. R. 200.

(*o*) *Baylis v. Jiggins* (1898), 2 Q. B. 315. Cf. *Hartley v. Hudson*, *ante*, p. 363; *Weld v. Clayton-le-Moors*, 86 L. T. 584.

(*p*) *Surtees v. Woodhouse* (1903), 1 K. B. 396, following *Stock v. Mcakin* (1900), 1 Ch. 683.

(*q*) *Lumby v. Faupel* (1904), 20 T. L. R. 237, *per* Collins, M.R., at p. 238.

liable for this sum, as such liability could not have been within the contemplation of the parties, as a covenant to pay such outgoings would not be applicable to a yearly tenancy. (r)

Where a cottage was let from year to year at a rent of £20, it was held that a covenant to pay *outgoings* did not oblige a tenant to pave a yard at a cost of £58, (s) on the ground that it could not be held to have been within the reasonable contemplation of the parties to a tenancy from year to year at £20 that the tenant should pay for the paving of the yard. (t) In that case, however, it was held that the supply of water to a w.c., as required by the sanitary authority, was within the reasonable contemplation of the parties.

(6) FUTURE RATES, ETC.

It seems that, in the absence of any express stipulation as to future assessments, a general covenant of this description will include all future rates, etc., of the same nature as, and for purposes similar to, those in existence at the time the covenant was entered into. (u)

If there is no express stipulation as to future assessments.

SECT. III.—WHERE VALUE OF LAND INCREASED BY BUILDING.

Difficult questions may arise, upon the construction of covenants, as to the proportions in which taxes and assessments are to be paid, where the value of the land has been improved by building. It is, in general, provided by the Legislature, with respect to express agreements, that nothing in the particular Act shall be construed to alter, determine, or make void any covenants or agreements whatever between landlord and tenant, or any other persons, touching the payment of taxes and assessments; or there are words to that effect. (w)

If a lessee covenants that he will pay all the taxes, charges, rates, etc., whatsoever, which are, or shall at any time thereafter

Lessor's liability.

(r) *Harris v. Hick* (1904), 1 K. B. 13.

(s) *Valpy v. St. Leonard's Wharf Co.*, 67 J. P. 402; 1 L. G. R. 305.

(t) *Ib.* See *per* Farwell, J., at p. 309, in the L. G. R. Cf. *Batchelor v. Bigger*, 60 L. T. 416. It appears to be a question of degree in each case.

(u) *Breuster v. Kidgill or Kitchen*, 12 Mod. 167; *Amfield v. White*, 1 Ry. & Moo. 216; *Giles v. Hoper*, Carth. 135; *Durand v. Bishop of Salisbury*, 1 Vent. 223. See *Bennett v. Womack*, 7 B. & C. 627; *Chaloner v. Bolshaw*, 3 App. Cas. 933.

(w) As to Land Tax, see 38 Geo. 3, c. 5, s. 35. See *Metropolitan Management Act*, 18 & 19 Vict. c. 120, s. 219; 25 & 26 Vict. c. 102, ss. 96, 97; *Public Health Act*, 1875, 38 & 39 Vict. c. 55, ss. 104, 226. See *post*, Part III. See 5 & 6 Vict. c. 35, ss. 60, 103, as to the property tax forming an exception to the rule.

during the demise be, taxed, etc., upon the demised premises, such a covenant will not be confined to rates payable by the landlord, but will extend to all future rates which might be imposed on the land itself, and to any increase by reason of additions and new buildings. (x) And, further, where land was leased for building, at a rent clear of all rates and assessments, the sewers rate and land tax excepted, the lessee was only entitled to deduct the sewers rate and land tax upon the original rent, and not in respect of the improved value after building. (y) So, in another case, a tenant of a piece of land, at a fixed annual rent, covenanted not to build without the licence of the lessor, and the lessor covenanted to pay all taxes charged, or to be charged, during the term; the lessee having, at the time of the lease, received such a licence, afterwards built so as to increase the annual value of the premises; and it was held that the lessor was liable to pay only the taxes upon the original value, those on the improved value being payable by the lessee. (z)

And, again, where a building lease was granted at the yearly rent of £7, and the premises, having been greatly improved, were afterwards underlet for £54 per annum, the original lessor was held liable only to pay the land tax in proportion to the old rent. (a)

Same principle where lessor covenants.

As will be seen from these decisions, the same principle of construction is adhered to where the *lessor* expressly covenants to pay "as well the land tax as all other taxes, charges, rates, etc., already charged, or to be charged, upon or in respect of the demised premises, or any part thereof," and the value of the lands is greatly increased by building. (b)

Test of lessor's liability.

The amount of rent received by the landlord is the test of his liability, without reference to any other consideration given for the lease; and if a lease be made in consideration of a premium and a small annual rent, the landlord is bound to pay such proportion only of the land tax as the reserved rent bears to the total value of the premises demised. (c) And the rule is the same, though the landlord redeem the land tax. (d)

(x) *Hurst v. Hurst*, 4 Exch. 571.

(y) *Smith v. Humble*, 15 C. B. 321.

(z) *Watson v. Home*, 7 B. & C. 285. See *Graham v. Wade*, 16 East, 29; *Watson v. Atkins*, 3 B. & Ald. 647; *Leo (or Yaw) v. Leman*, 1 Wils. 21; *Hyde v. Hill*, 3 T. R. 377; *R. v. Scott*, 3 T. R. 602.

(a) *Barnfather v. Lee*, cited by Buller, J., 3 T. R. 379; *Whitfield v. Brandwood*, 2 Stark. 440; *Bramston v. Robins*, 12 J. B. Mo. 68.

(b) *Watson v. Home*, 7 B. & C. 285; *Whitfield v. Brandwood*, 2 Stark. 440; *Smith v. Humble*, *supra*.

(c) *Ward v. Const*, 10 B. & C. 635.

(d) *Ib.*

SECT. IV.—LIABILITY AS BETWEEN VENDOR AND PURCHASER.

The apportioned expenses of paying, under sect. 150 of the Public Health Act, 1875, become a charge on the land, payable by the owner thereof at the date when the work is completed, (e) Thus, where the houses were sold under an open contract, and at the date of the sale the works had been done, but the final demand for payment was not served until after the purchase ought to have been completed, the expenses were held to be payable by the vendor; (f) and where a local authority had apportioned the amount of the expenses on the frontagers, the person who was owner of premises fronting on the street at the time when the works were completed, but who had ceased to be the owner at the date of the service of demand for the amount apportioned in respect thereof, was held liable to pay the amount. (g)

Under the Metropolitan Management Acts the result is different: the expenses are not a charge under those Acts, but merely successive personal liabilities upon the successive owners. (h)

SECT. V.—LIABILITY AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

Where the testator gave freehold and leasehold houses, bonds, and consols in trust to pay the income, after deducting the ordinary outgoings, to his widow for life, it was held that the tenant for life must bear the cost of drainage works done under the Metropolitan Management Act, 1855, s. 73. (i)

But where the tenant for life died before the work was done, paying expenses, under sect. 105 of the same Act, had to be borne by the remainderman. (k)

And where trustees, in whom the legal estate was vested on trusts for equitable tenants for life with remainders in strict settlement, paid the expenses of drainage works under the Public

(e) *Tottenham L. Bd. v. Rowell*, 15 Ch. D. 378; *Hornsey L. Bd. v. Monarch Building Society*, 24 Q. B. D. 1; *Corp. of Birmingham v. Baker*, 17 Ch. D. 782. But see *R. v. Swindon New Town L. Bd.*, 4 Q. B. D. 305.

(f) *Re Bettlesworth and Richer*, 57 Ch. D. 535. And see *Wallsend L. Bd. v. Murphy*, 61 L. T. 777.

(g) *Milard v. Bulby-with-Hetherpe*, U. D. C. (1904), 21 T. L. R. 8, not following *R. v. Swindon L. Bd.*, *supra*.

(h) *Egg v. Bayney*, 21 Q. B. D. 107.

(i) *Aston v. Crawley*, 28 Ch. D. 431.

(k) *Bowering v. Field*, W. N. 1888, p. 36; *Boer v. Hopkins*, 40 Ch. D. 572, a case under the Public Health Act, 1875, s. 150.

Health Act, 1875, out of capital moneys in their hands, it was held that the moneys so paid must be treated as a charge on the premises; and, further, that such works were not repairs within a direction in the will, under which the premises were held, that the parties beneficially interested in any of the houses should keep the same in good and absolute repair. (l)

SECT. VI.—LIABILITY AS BETWEEN TWO FRONTAGERS.

Frontagers sometimes agree that one or other of them shall pay or discharge any impositions. So where a road was widened in the year 1888 and made up by two frontagers under an agreement, whereby one of them was not "to be under any liability to contribute to the maintenance or repair of the said roadway and sewers and main drain, or any works connected therewith; but the same were to be wholly and solely maintained by the other frontager, unless and until the same should be taken over by the parish or some other local or public authority;" in 1901 the local authority made up the road or street, and apportioned on the first frontager the sum of £108. It was held that the agreement did not apply to the works executed by the authority, and that the plaintiff could not recover what he had paid from the defendant. (m)

(l) *Harrison v. Barney*, [1894] 3 Ch. 562.

(m) *Moore v. Todd* (1903), 19 T. L. R. 642.

PART II.

FORMS AND PRECEDENTS.

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SECT. I.—BUILDING CONTRACTS, ETC. (a)

I.

FORM OF ADVERTISEMENT *for building contracts.*I.
Advertisement for
Building
Contracts.

TO BUILDERS AND OTHERS.—[*Advertisers*] are prepared to receive tenders for the erection of a _____ in _____.

Persons desirous of tendering must apply at _____, where the plans, specification, and a copy of the form of contract can be seen, on and after _____, the day of _____, between the hours of eleven a.m. and four p.m., and where bills of quantities and a form of tender can be obtained on payment of _____.

The [*Advertisers*] do not hold themselves responsible for the accuracy of the bills of quantities, which must be verified by the persons desirous of tendering; (b) nor do the [*Advertisers*] bind themselves to accept the lowest or any tender. (c)

The tenders are to be delivered before twelve o'clock on the _____ day of _____, addressed to _____, and must be endorsed "Tender for _____."

Dated the _____ day of _____.

II.

FORM OF ADVERTISEMENT *for tenders for executing repairs to a building—to be based on quantities.* (d)*II.
Advertisement for
Tender.

TO BUILDERS AND OTHERS.—*Repairs to*

The undersigned is prepared to receive tenders on behalf of _____, the owner of the above works, for the above works according to the drawings and specification to be seen at his office at _____ any week-day between _____ a.m. and _____ p.m.

Bills of quantities with the rate of charge and the amount of each item and total sum on which the tender is based, together with allowance made for old materials, should be delivered together with the tender.

The person whose tender is accepted shall, when required, enter into a formal contract with _____ (the owner) for the due execution of the works, such contract to be prepared by the solicitors of the owner; but the written acceptance by the owner of a tender is to constitute a binding agreement between the owner and the person so tendering, whether such formal contract is or is not subsequently prepared or executed.

Tenders are to be delivered, etc. (Follow Form I., *supra*).

The lowest or any tender will not necessarily be accepted.

[Signed] [Name and address of architect.]
Dated the _____ day of _____, 19 _____.

III.

FORM of tender for a building contract. (c)

III.
Tender.

Building 6 houses at _____ Tender.

I, C. D., hereby undertake to execute works as shown and described in the plans and specification prepared by Mr. _____, architect, for the sum of £ _____.

Yours truly,

To A. B.

[Signature and address of owner.]

(a) Precedents marked * were prepared by J. Andrew Strahan, Esq., Barrister-at-Law, and are reprinted from the *Encyclopædia of Forms and Precedents*, by permission of the publishers. Builders contracting with the L.C.C. should consult the Standing Orders of the Council, which contain a number of provisions as to tenders, etc.

(b) It has already been explained (see p. 13, *ante*) that there is no implied warranty that bills of quantities are accurate. In order to avoid dispute, however, it is well to draw the builder's attention specifically to this matter.

(c) As to these words, see p. 22, *ante*.

(d) See note (a), *supra*.

(e) As to tenders generally, see p. 18, *ante*, et seq.

IV.

CONTRACT FOR SMALL WORKS, *without an architect.** (f)

IV.

Contract for
Small Works
—without
Architect.

MEM. OF AGMT made this day of . Betw. (hereinafter termed the builder) of , of the one part and (hereinafter termed the owner) of the other part. Whereby it is agreed as follows :

1. In consideration of the sum of £ which the owner hereby agrees to pay to the builder within one month after the builder has completed the works (g) hereafter referred to and in the manner hereafter described and has handed the same over to the owner, the builder hereby undertakes to execute and complete in a thorough and worklike manner and with the best materials [or with materials to be provided by the owner] all the works set out or described in the drawing and specification hereto annexed and signed by the owner and builder, and all work incidental to the proper execution and completion of the said works and to hand over to the owner the said works so duly executed and completed within months after the date of this agreement.

Consideration
for and com-
pletion of
works.

2. If the owner shall make the builder any advances of money during the execution of the said works he shall be entitled to deduct the same from the said sum of £ when the latter becomes payable.

Advances to
builder.

3. If the builder fails to complete as aforesaid and hand over to the owner the works by the time fixed in this agreement for completion unless such failure be due to the default of the owner the owner may deduct from the said sum of £ or the balance of the same then unpaid the sum of £ for every day that shall elapse between the day fixed for completion and the actual completion and handing over of the works.

Penalties.

4. If the owner at any time during the progress of the works be dissatisfied with their rate of progress or the quality of the materials used, or of the workmanship, he may apply to [some person named] to appoint an architect [or a surveyor] to inspect the works, and should such architect [or surveyor] certify in writing that the rate of progress or the materials used or the workmanship or any or all of these is or are unsatisfactory or not in accordance with this contract, the owner may by notice in writing sent by post to the builder at his usual place of abode immediately determine this agreement and the owner may then enter upon the said works and call in another builder to complete the same and may pay such other builder the cost of such completion out of the said sum of £ payable under this agreement, or the balance of that sum if advances have been made to the builder, and if such cost be more than such sum or the balance of such sum then the difference between it and such sum or balance shall be a debt due from the builder to the owner.

Determination
of contract on
breach by
builder.

5. If after the completion or alleged completion of the said works any dispute shall arise between the owner and the builder as to whether the works have been properly executed or completed or as to delay in such completion or as to extras to or deductions from the said works, either the owner or the builder may apply to the said [the person named in clause 4] to appoint an architect [or surveyor] to decide the same; and such architect [or surveyor] after making such investigation as he may consider proper may by his certificate in writing decide such dispute and declare what payment or deduction (if any) is to be made in respect of the subject-matter of the same and such decision and declaration shall be binding and conclusive upon both the owner and the builder.

Disputes.

AS WITNESS, ETC.

THE SPECIFICATION ABOVE REFERRED TO. (h)

(f) See note (a), p. 372, *supra*.

(g) See F. V., Cl. 3, p. 374, for an alternative method of payment.

(h) See Cl. 1.

V.

Contract for
Small Works
—with
Architect.

CONTRACT FOR SMALL WORKS, *subject to the approval of an architect.* (i)*

ARTICLES OF AGREEMENT made this day of . Between
(hereinafter termed the builder) of the one part and (hereinafter termed
the owner) of the other part.

WHEREBY IT IS AGREED AS FOLLOWS :—

1. THE bldr or his personal repratives for the cousidon hrnfr mentioned shall at his or their own proper costs and charges wn the space of calendar months next after the date thereof in a good substantial and workmanlike manner erect and build one house or messuage upon the ground belonging to the owner at together with the several erections and buildings set forth in the schedule hereto according to the elevations plans and specification hereunto annexed and subject to the approbation of the surveyor of the owner and shall also at his or their own proper costs find and provide good proper and sufficient materials of all kinds for erecting the said buildings subject to the approbation of the owner or his surveyor [*or* and will build the same with such stone brick timber and other materials as the owner shall find and provide (*k*) for the same].

Provision in
case of delay.

2. IF the builder shall be guilty of any neglect or delay in the building or completing of the said house and the owner shall give or leave notice in writing of such neglect or delay at the place of abode of the builder or upon the said piece of ground intended to be built on then it shall be lawful for the owner or his personal representatives in case the builder shall not proceed within days after such notice given or left as aforesaid with the completion of the said works to employ another contractor or a sufficient number of workmen to finish and complete the said house and the owner or his personal representatives may deduct and retain all such sums of money and expenses as he or they shall pay or incur in the completion of the said buildings. And the builder shall not in any manner do or cause to be done any act matter or thing whatever to prevent the person or persons so employed by the owner or his personal representatives from completing the said house.

Remuneration
of builder.

3. THE owner shall pay or shall cause to be paid to the builder the sum of £ in manner following that is to say the sum of £ part thereof at the laying of the chamber floors, the sum of £ further part thereof at the covering in, and the sum of £ the remaining part thereof for the work when completely finished to the satisfaction of the owner or his surveyor.

Owner to find
materials.

[4. THE owner shall at his own proper costs and charges find and provide all the stone brick and timber and other materials necessary for the building of the said house.]

Allowances for
alterations.

5. IN case the owner shall direct any more to be done in or about the said buildings than what is contained in the said specification then and in such case the owner shall pay or cause to be paid to the builder so much money as such extra work shall be worth according to the schedule of prices contained in the said specification or in case or so far as such schedule shall not apply then as may be determined by the said surveyor.

Arbitration
clause.

6. IF any dispute or difference shall arise between the parties hereto touching the said buildings or the money to be paid for the same according to the admeasurement and value thereof in case the same shall be admeasured or

(i) See note (a), *ante*, p. 372.

(k) As to delay by employer, see Chap. V., s. (1) (5), *ante*, p. 37.

valued or touching any alteration or addition or any other matter or thing whatsoever relating to the work hereby contracted to be done then and in such case it shall be left to the determination and award of the said surveyor in manner provided by the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force [or of a person to be appointed by the President of the Institute of British Architects who after such investigation as he may think proper shall deliver his award which shall be binding and conclusive on both the builder and the owner].

AS WITNESS, ETC.,

[

THE SCHEDULE ABOVE REFERRED TO.

VI.

VL

AN AGREEMENT between a builder (l) and an employer for the erection of a house (or several houses) according to specification, etc. (m) Variations where materials are found by the employer.

Building Contract.

AN AGREMT made the day of BETWEEN [the builder] of, etc. (herein called the blder), of the one part, and [the employer] of, etc. (herein called the employer), of the other part, whirby it is agrd as follows :—

1. THE blder shall, at his own cost, charges, and expenses, [forthwith begin and in an expeditious and workmanlike manner], erect and build in a good, substantial, and workmanlike manner, messes or dwg-hses at in such inner, and within such time, as are herein expressed and limited, and conformably to the plans, elevations, sections, and specifications set forth in the schedule hereto, and signed by the blder, and also to such explanations and directions as E. F., the architect of the employer or other the architect or architects for the time being employed by the employer to superintend the erection and completion of the works, [herein called the architect] shall give for the purposes of the works, for the conson of £ , payable at the time and in inner herein expl. (n)

Builder to erect houses, etc., agreeably to plan at his own costs.

(l) It is sometimes convenient to insert a clause defining the term "builder" to mean "C. D. and E. F., carrying on business under the name or style of , and his or their heirs, executors, administrators (and assigns)."

The term "assigns" should not, however, be used unless the employer wishes the builder to have power to assign his contract.

(m) See F. VII., pp. 379, 382, and F. XI. B., p. 393, for other conditions, which may be inserted, if required by the particular circumstances.

(n) If the materials are to be found by the employer, continue:

"And the sd messes or dwg-hses and bldgs shall be erected and built with such bricks, stone, lime, timber, and other materials as shall be provided for that purpose by the employer."

Materials found by employer.

If the materials be found by the employer, it will be proper to protect him from any loss which may happen from imprudent use of the same, by inserting the following proviso:

"PROVIDED ALWAYS that the blder shall be accountable for all the materials which shall be delivered for the sd bldgs at the place where the same are intended to be erected, and shall be charged with the respective quantities of such articles so delivered, and credited with so much only as shall be actually used and expended in, about, and upon the said bldgs and works, together with a reasonable allowance for waste in the working up of the same, and in case there shall be any balance or deficiency of materials, between the respective quantities delivered and the respective quantities used and expended, and allowed for waste as aforesaid, then the sd blder shall be accountable for, and charged with all such balance or deficiency, at and after the rates and prices resply at wh the sd materials were purchased and laid in."

Builder to be accountable for materials when delivered.

VI.

Building Contract.

Under the inspection of the employer's architect, —and to supply all materials and scaffolding, etc.

To be completed in a given time.

Builder admits sufficiency of specifications, etc.

Completion to be testified by architect's certificate.

Materials not approved of to be replaced. Bad work to be taken down.

Allowance to be made for subtracted or extra work.

2. THE blder, at the like expense, shall [do, perform, and execute, in a good, substantial, and workmanlike manner, and agreeably to the directions and approbation of the architect, all such excavations, levellings, spreadings, works, matters, and all other things, in and about erecting the sd houses, as shall be by such architect considered necessary or proper in relation thereto; and shall, at the like cost and charges] find and provide all [and all manner of bricks, tiles, stones, lime, nails, lead, iron, brass, timber, wood, wainscot, glass, and all other] materials and things, and all scaffolding, timber and plant, tackle, tools, utensils, labour, and workmanship whatsoever necessary and sufficient, and that can, shall, or may be required to be used and done, in and about the erection of the sd messes or dwg-hses (o) [all the sd materials being the best of their several kinds and to be approved of by the architect].

3. THE blder shall complete and finish the sd hses, fit for habitation, on or before the _____ day of _____, and in all things agreeably to the plans, elevations, sections and specifics or descriptions, and parlars lrmbrfe expd.

4. (p) THE blder shall be accountable for the full performance of this contract, and by signing hereof, admits that the sd plans, elevations, sections and specifics, descriptions, and parlars, before referred to, are sufficient for their intended purpose, and that without any additional or extra work, other than the works set forth thrby, or necessarily inferred to be done from the general nature and tendency of the plans and descriptions afsd; and that the whole of the sd works shall be done to the entire satisfaction of the architect to be testified by a certificate in writing signed by such architect, and in all respects according to the intent and meaning of the specificon afsd, upon every sentence whereof a fair and liberal construction shall be placed. (q)

5. (o) IF any materials shall be brought on the sd premes which shall not be approved of by the architect [then notwithstanding a certe may have been previously given by the architect] the blder shall take them away at his own expense, and provide such materials in lieu throf as the architect shall approve; and if any part of the sd works shall not be executed to the satisfaction of such architect [then notwithstanding a certe may have been previously given by the architect] the blder shall immedly take down and execute such work as the architect may require. [See Cl. 5 of F. VII., p. 380, as to default.]

6. (o) IF any part of the sd materials or work shall be ordered not to be used or done resply, under the handwriting of the architect, the same shall be withdrawn, and the difference of expense occasioned thrby shall be deducted from the amount lrbly agrd to be pd to the blder, and in like manner if the employer or the architect shall in writing under his hand order any materials, or work to be used or done, not included in this contract, (r) the difference of the expense to be so

(o) This clause will be modified where the employer finds the materials.

(p) This clause is usually inserted, although there is no implied warranty of correctness of specifications. See p. 17, ante.

(q) The following is another clause:

"The bill of quantities on which the tender of the contractor is based was prepared for the purpose of assisting persons tendering for the works in making their calculations, but it does not profess to give actual cube measurements or to be otherwise than approximate in the figures therein stated, and the employer will not be responsible for the accuracy of such quantities, and the blder is not to be entitled to any claim for extras based on any alleged error therein, but is responsible for the completion of the entire works as described in the plans and specifications at the contract price."

As to the law relating to the accuracy of bills of quantities, see p. 13, ante.

(r) It is usually provided, as above, that the employer's or the architect's sanction shall be given before any deviation is made; but, as the architect is only the employer's agent,

occasional shall be added to the amt of the sum hrly agd to be pd., but no account or allowance shall be had or made in respect of any work omitted to be done, nor of any extra works which shall be done, unless the same be omitted or done by an order in writing under the hand of the employer or of the architect; and all accounts and allowances for such omission or extra work resply shall be ascertained and settled by the architect from time to time as they shall be made or take place, and his decision shall be final and binding on both parties.

VI.

Building Contract.

7. In case the sd works shall not be completed and finished and the sd Forfeiture
loss shall not be fit for habitation on or before the sd day of , the bidder for delay in
shall pay to the employer and forfeit out of the moneys due to him under this finishing.
agmt, as and for liquidated damages, (i) the sum of £ per week, for every
subsequent week, until the sd works shall be so completed and finished. Pro-
vided always, that in case the bidder shall be prevented by any strike (u) among P proviso in case
his workmen from complying with this agmt, the architect may extend the time of a strike.
for the completion of the works for such reasonable period as he may think fit,
and shall in writing certify to be necessary. (w)

7a. [Insert here provision as to suspension of work during frost, etc., if Suspension of
necessary. (See Cl. 16 of F. XI. B. p. 395.)] work during
frost, etc.

8. The employer shall pay to the bidder the sum of £ in the manner Employer will
following, that is to say, the sum of £75 p.c. on the amount of the materials used pay as works
and the works as the same shall proceed in sums of not less than £ proceed ac-
paymt, when and not before the sd amount and percentage shall be ascertained cording to the
and certified in writing under the hand of the architect. (x) And the accounts of certificate of
the architect.

a before stated (*ante*, pp. 87 and 187), to see the work included in the contract carried out, it is advisable, in order to avoid disputes, which frequently arise on this subject, to provide that no deviation shall be made without the written sanction of the employer only. See p. 182, *et seq.*

(i) As to the intent and meaning of the forfeiture clause, see Chap. XI., Sect. III., p. 131.

(u) As to the meaning of this phrase, see Chap. XI., Sect. II., p. 112.

(w) As to strikes, see p. 125 n., *ante*.

(x) If the materials are to be found by the employer, add:

" PROVIDED ALSO, and it is hrly further declared and agd by and between the Provision in
sd parties hrly, that in case any of the works hrly agd to be done performed, and case of delay
executed by the bidder, shall be stopped, hindered, or prevented by reason of the in supply of
want of bricks, timber, lime, stone, or any other materials to be supplied for the materials by
same by and at the expense of the employer, and the bidder shall prove to employer.
the satisfaction of the architect that such stoppage, hindrance, or prevention was
occasioned by such want of bricks, timber, lime, stone, or other materials as aforesaid, then, and in every such case, the time hrly for limited for the finishing and
completing such several works as aforesaid, shall be extended, without incurring the
sd penalty in respect thereof, to so long a time after the sd day of as
such works and bids shall have been so stopped, hindered, or prevented from
proceeding by reason of such want of bricks, timber, lime, stone, or other
materials as aforesaid, and so from time to time, as often as any such stoppage,
hindrance, or prevention shall take place, but not for any longer time, or on any
account or pretence whatsoever."

(z) If the employer supply any of the material, this clause as to the rate of payment must be altered accordingly. There may here be added, if such be the agreement:

" And the sd employer shall provide and supply the bidder, weekly, and Employer to
every week, during the progress of such works, and until the same shall be find money to
finished, with all such sum and sum of money as shall be necessary for the pay weekly
purpose of paying and discharging the wages of all workmen and labourers that wages of
shall from time to time be employed in or about the sd works, the amount labourers.
thereof to be ascertained in the manner hrly provided."

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Building Contract.

And the whole within three months after the work is finished, and architect gives certificate of satisfaction.

Builder to personally superintend not to sub-contract.

Foreman to be kept on premises. Power to discharge workmen.

Materials immediately belong to landlord.

Builder to comply with rules of local authority.

Proviso on failure of builder to carry out contract.

the sd works shall be adjusted and finally settled within [3] months after the sd works shall have been completed and finished in the manner aforesaid, and when the sd accounts shall be adjusted and finally settled, and the architect shall have certified in writing as to the balance then payable to the blder, the residue of the said sum of £ and also such other sum or sums of m^y as may become due, for or on account of extra works in manner aforesaid, shall be pd by the employer to the blder; but the blder shall not be entitled to receive the sd balance, notwithstanding any certificate during the progress of the work, until the architect shall certify in writing that the whole of the sd works have been completed and finished to his satisfaction. (See also Cl. 10 of F. VII., p. 381; Cl. 3 of F. XI. A, p. 392; and Cl. 21 of F. XI. B, p. 395.)

9. The blder shall not, unless with the consent of the employer in writing, employ a sub-contractor for the exⁿ of the works, or any part thro^f [nor let out any part of the work as task work to journeymen or taskmasters], but shall personally superintend the same. (x)

10. A COMPETENT foreman [in each department of the work] shall always be kept upon the premisses by the blder, to whom all notices and orders may be delivered; and the architect may discharge or may require the blder to discharge any foreman or workman whom such architect may consider incompetent, or as acting improperly, and the blder shall forthwith comply with any such requirement as aforesaid.

[Insert here agreement by builder to insure, if required. (y) (See Cl. 2 of F. XI. A., p. 392.)]

11. (z) ALL materials shall become the ppty of the employer immedly they are brought upon the premisses by or for the blder. (a)

12. The blder shall, until the works are completed, comply with the regulons and orders of the local authority for the time being relative to the sd works and premisses.

13. If a receiving order in bankruptcy shall be made agst the blder, or if he shall make any assignment for the benefit of or composon with his creditors, or take any step with the object of any such asst or composon, or if his goods shall be taken in exⁿ on lawful process, or if the works do not proceed with proper despatch, or continuously, or to the satisfaction of the architect, the employer may give notice in writing to the blder at his usual place of abode or business or to his foreman or assee or trustee to proceed regularly and effectually with the sd works hrby contracted for, and if the blder, his assee, or trustee shall not proceed with the sd works as aforesaid within the space of 7 days after such notice is given as aforesaid, the employer may, if he shall think fit, enter upon and take posson of the works and purchase materials and employ another blder or sufficient workmen to complete the sd works, and thereupon the blder and his assee or trustee shall forfeit all right and claim to any further paymt under this agrmt; and all the balance and moys which wd otherwise have been payable to the blder shall, upon such default as aforesaid, be forfeited, and all materials then being upon or about the site of the sd works shall remain the absolute ppty of the employer; and if the sd balance and moys so forfeited shall be insufficient to pay the workmen, materials, and expenses for completing the works hrby contracted for, then the blder shall make good and pay such deficiency to the employer upon demand. The employer shall have a lien on any plant or scaffolding, and the blder or his assee or trustee shall not, upon such event or

(x) As to sub-contractors generally, see *ante*, p. 39. For a form of clause by which building owners may be made liable to sub-contractors direct, see p. 41, *ante*.

(y) See Cl. 11, F. VII., p. 381, for provision that accidents are to be borne by employer.

(z) See note (o) *ante*, p. 376.

(a) See F. VIII., Cl. 15, p. 385; XI. B., Cl. 4, p. 393; and XIX., Cl. 18, p. 409, as to these conditions. See also, *ante*, p. 170, *et seq*.

default as aforesaid, be entitled to remove from the premises any plant or material used, and until the architect shall certify that the same are not further required, and that there is no money due from the bidder to make good such deficiency as aforesaid. (b)

VI.

Building
Contract.

14. (c) UNTIL this contract shall be completed, and the work handed over to the employer in accordance therewith, the bidder shall in every respect be responsible for, and replace and make good, all loss, injury, or damage to the premises, or to the owners or occupiers of any land or buildings adjoining, which may be caused or done by him or his workmen; or which they might have prevented. And the bidder shall be responsible for all accidents and damages of any kind which may occur during the time of or consequent upon the performance of any work under this contract, and shall indemnify the employer against the same, and the employer may, if he think fit, compromise any claim which may be made upon him or any action which may be brought against him in respect thereof, and the bidder shall forthwith repay such amount, or the same may be deducted from any moneys which may remain due to the bidder. (d)

Bidder liable
for loss or
damage to ad-
joining build-
ings, etc.

15. [Bad work to be rectified after certificate. (See Cl. 13 of F. VII., p. 351.)]

16. THE architect shall have the custody of the plans, elevations, sections, and specifications, and when the contract shall have been performed shall deliver the same to the employer.

17. THE due performance of this contract shall be secured by the joint and several bond of the bidder, and of, etc., as securities for the bidder in the sum of £ . . . (e)

[18. THE decision of the architect, by a certificate in writing, upon all matters relating to the amount, state, and condition of the works actually executed, and in any wise relating to anything to be done, executed or performed resply, in accordance with this agreement, shall be final and binding on both parties, except in so far as a subsequent certificate may modify or alter the certificate preceding.]

Architect's
decision to
be final.

AS WITNESS, ETC.

VII.

VII.

AN AGREEMENT under seal between a corporation, (f) or other public body, and a builder for erecting a building. Payments by instalments of fixed sums according to progress.

Building
Contract
under Seal
with Corpora-
tion, etc.

AN AGREEMENT made the . . . day of . . . BETWEEN A. B. and C. D. hereinafter called the contracters, of the one part, and the . . . Corporation hereinafter called the Corporation,

Parties.

(b) In some cases the agreement only provides that the employer may deduct and retain the costs and expenses for materials and workmen in completing the works out of the money which shall be due to the builder.

(c) This clause will make the builder liable for interference with ancient rights enjoyed by adjoining owners, or with rights of support. As to ancient rights, see Chap. XXIII., and as to support, see Chap. XXV. The second half of the clause will make the builder responsible for any accidents which may happen during the demolition of old or the erection of new buildings. See also Cl. 11 of F. XI. II., *post*, p. 357.

(d) If it is desired that the builder shall be liable for "extraordinary traffic on highway," the following clause should be here inserted:

"The builder shall indemnify the employer against all actions or proceedings which may be brought or taken against the owner in respect of damages caused to a highway by the contractor in the performance of this contract."

See generally, as to extraordinary traffic, Chap. XXIII., Sect. II. (2), *ante*.

(e) See form of bond, *post*, F. XV., p. 400. As to sureties, see *ante*, p. 25, *et seq.*

(f) This form can, of course, be used by any other employers, by making an alteration in the description of the parties. See preceding form, and see F. XI. II., pp. 355, 357, XLVII., p. 376, for other conditions.

VII.

Building Contract under Seal with Corporation, etc.

Contractors to provide all materials, scaffolding, and to fence round works.

Abatement or extra charge for subsequent alterations.

of the other part. Whereby the contractors jointly and severally covenant with the Corpon, and the Corpon covt with the contractors as follows :

1. [*Contractors to build to satisfaction of architect of corporation for certain sum.* Insert Cl. 1 of F. VI., p. 375.]

2. [*Contractors to provide all materials, scaffolding, etc.* Insert and add :] and erect and keep a proper bound or fence round the same, of the height of ft or more, during the whole progress of the work, and until the sd bldings and works shall be completed.

3. If the Corpon shall at any time or times hrrar think proper to direct any alterons or devions to be made in the form, or quantities, or elevation, or plan of the sd blding or other the work hrnbfre agrd to be done, before the same shall be performed, the Corpon shall give written instrons under seal (g) for such alterons or devions, and the same shall not in any wise make void or prejudice these presents. But in every such case the contractors shall attend to and pursue the sd directions which they shall in that behalf receive from the Corpon, (h) and execute and perform the same in a proper and workmaulike manner; and in every such case it shall be referred to the architect to consider, and by writing under his hand to determine, how far such alterons or devions will on the whole be a saving or additional expense to the contractors; and if the same shall appear to be a saving, the amount throf shall be abated out of the last instalmt or paymt of the sd sum of £ agrd to be pd for the sd work as hrn provided; but if the same shall occasion an additional expense, then the amnt throf shall be ascertained by the architect and be pd to the contractors by the Corpon over and above the sd sum, in the same manner and at the same time as hrnar is exprd for the paymt of the ultimate balance of the sd sum of £ ; but the contractors shall not be considered to have authority for any such alteron or devion, or the right to make any claim for the valne or otherwise in respect throf, without such written instrons under seal as afsd.

4. [*Bad materials to be removed.* Insert Cl. 5 of F. VI., p. 376.]

Bad work to be pulled down. In default architect may remove materials, etc.

5. If the contractors do not within 48 hours after notice in writing given to them or their foreman requiring the removal of materials or the demolition of work not approved of, the architect may cause the same to be removed away to any place and cause proper materials to be substituted therefor, or may cause such work to be demolished and re-erected by such workmen as he shall think fit, and in either case the cost of so doing shall be paid by the contractors and may be deducted from the next or any other paymt due to the contractors.

Contractors to remove all rubbish, etc.

6. THE contractors shall [during the progress of the works or], upon the completion of the sd building, remove all the scaffolding, boards, and fencing, and all rubbish and materials then remaining in or about the same [as may be from time to time directed by the architect] not required to be retained by the Corpon.

Contractors not to make sub-contract.

7. [*Contractors will give personal attention, and will not make sub-contract.* Insert Cl. 9 of F. VI., p. 378.]

Payment of liquidated

8. (i) THE whole of the sd building shall be completely finished and fit for use

(g) Where the original contract is under seal it is doubtful whether extras need be ordered under seal. See *Williams v. Barmouth U. D. C.*, 77 L. T. 383, noted *ante*, pp. 45, 49. And see *Kellett v. Mayor of Stockport*, 70 J. P. 154.

(h) See note (r), *ante*, p. 376. For a form of contract for execution of works by contractor in which sureties join, see *Encyclopedia of Forms*, Vol. 10, p. 293.

(i) As to the necessity for a penalty clause in a contract with an urban authority, see *ante*, p. 49.

and occupation on or before the day of , and in default thereof the contractors shall pay unto the Corpn the sum of £ per week as and for liquidated damages, and not by way of penalty, for every week after the said day of until the same shall be so finished and completed; which sums shall or may be retained and deducted out of so much of the sd sum of £ as for the time being shall remain unpaid, or be recovered and recoverable from the contractors by the Corpn by action or otherwise.

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Building Contract under Seal with Corporation, etc.

damages if work not finished in time.

9. [Insert here any provisions as to extension of time on account of inclement weather or strikes. (E.g. Cls. 16, 27, F. XI. B., pp. 395, 396.)]

10. The Corpn shall pay or cause to be paid to the contractors the sum of £ in instalments as follows: that is to say, the first instalment when the brickwork of the sd building shall be carried up level with the one pair floor, the second instalment when [state particular period, and other instalments], the instalment when the roof of the sd building shall be completely covered in; and which instalments shall respectively be of an amount equal to [three fourth] parts of the value of the works which at the sd respective times or periods shall have been performed, as certified in writing under the hand of the architect, and the or last instalment (in completion of the sd sum of £), and also such further or other sum as may have been occasioned by any such alterations or deviations from the original plan of the building as aforesaid, within [three] calendar months next after the sd building shall be wholly completed and perfected. No payments shall be made to the contractors except on the certificate in writing of the architect that the building has been satisfactorily completed at the sd respective periods. (k)

Payment of contract price — by instalments according to progress.

11. If damage by storm, tempest, accidental fire, (l) or other inevitable accident shall happen to the building, which it shall not be in the power of the contractors to prevent, the same shall be made good and repaired at the expense of the Corpn, but if such damage shall have happened or be occasioned by or through any neglect or default of the contractors in any wise, then the same shall be immediately repaired and made good at their own cost and expense. (m)

Accidents, etc.

12. The contractors shall indemnify the Corporation from and against all payments by way of compensation or otherwise which the council may be called upon to make as undertakers within the meaning of the Workmen's Compensation Acts, 1897 to 1900, or any statutory modification thereof in respect of any accident to any workman arising out of and in the course of his employment by the contractors in the execution of the work under this contract and from and against all actions, claims, and demands whatsoever in respect thereof or in respect of any loss, injury, or damages whatsoever to any third person arising out of or occasioned by the negligent, imperfect, or improper performance of this contract by the contractors, their workmen, servants, or agents.

Workmen's compensation, etc.

13. NOTWITHSTANDING that any certificate may have been given by the architect, if any bad work or defect (n) shall be discovered within after the completion of the building, no further payment (if any due) shall be made to the contractors, and the contractors shall make good all such defective or bad work

Bad work discovered after completion to be made good notwithstanding certificates.

(k) See also Cl. 8, F. VI., p. 377.

(l) Omit if agreement is inserted for insurance against fire by contractors. See Cl. 2, F. XI. A., p. 392.

(m) This is an unusual clause; but see *ante*, Chap. XV., as to inevitable accidents not excluding builder. As to workmen's compensation, see Cl. 21, F. VIII., p. 387.

(n) See *Beur v. Colonial Government* (1901), 19 S. C. (Cape of Good Hope), Rep. 143, noted *ante*, pp. 35, 118.

VII.

**Building
Contract
under Seal
with Corpora-
tion, etc.**

in accordance with the stipulations herein contained, within days after notice in writing from the Corporation, or in default the Corporation may do so, and the costs and expenses incurred in either case shall be paid and be recoverable from the contractors.

14. [*Insert conditions as to foreman being kept on the premises, and power to discharge workmen. See Cl. 10, F. VI. (p. 378); Cls. 8 and 9, F. VIII. (p. 384); Cl. 12, F. XI. B. (p. 395).]*

15. [*Insert provisions as to materials becoming the immediate property of the Corporation. Cl. 11, F. VI. (p. 384); Cl. 4, F. XI. B. (p. 393).]*

16. [*Insert power to take possession of works on failure of contractors to carry out contract. See Cl. 13, F. VI. (p. 380); Cl. 26, F. VIII. (p. 388); Cl. 19, F. XIX. (p. 410).]*

Interpretation
of "Corporation,"
and "Contractors."

17. EXCEPT where the context may require a different construction, the expression "Corporation" hereinbefore used shall be deemed to include the successors of the said Corporation, and the expression "contractors" shall be deemed to include the executors and administrators of the said A. B. and C. D.

[*Arbitration clause, F. XII., p. 398.*]

IN WITNESS, ETC.

VIII.

**Building
Contract
sanctioned
by the Royal
Institute.**

VIII.

Form of Agreement and Schedule of Conditions for Building Contracts sanctioned by the Royal Institute of British Architects. (p)

ARTICLES OF AGREEMENT made the day of 190 BETWEEN
of in the County of (hereinafter called "the employer") of the one
part and of and of in the county of builder (q)
(hereinafter called "the contractor") of the other part. WHEREAS the employer is desirous of (r) at and has caused drawings and a specification describing the work to be done to be prepared by of , his architect: AND WHEREAS the said drawings numbered 1 to inclusive and the specification and the bills of quantities have been signed by or on behalf of the parties hereto: AND WHEREAS the contractor has agreed to execute upon and subject to the conditions set forth in the schedule hereto (hereinafter referred to as "the said conditions") the works shown upon the said drawings and described in the said specification and included in the said bills of quantities for the sum of

NOW IT IS HEREBY AGREED AS FOLLOWS:—

1. IN consideration of the sum of to be paid at the times and in the manner set forth in the said conditions, the contractor will upon and subject to the said conditions execute and complete the works shown upon the said drawings and described in the said specification and bills of quantities.

2. THE employer will pay the contractor the said sum of £ or such other sum as shall become payable hereunder at the times and in the manner specified in the said conditions.

(p) This form is published in this work by the kind consent of the Royal Institute. Although its usefulness has been seriously impaired by the decision of the Court of Appeal in *Robins v. Goddard* (1905), 1 K. B. 294 (see p. 98, ante), the editors have thought it wise to insert it with notes explanatory of the various clauses.

(q) Insert "s and co-partners" if such is the fact.

(r) State nature of intended works.

3. THE term "the architect" in the said conditions shall mean the said architect, or, in the event of his death or ceasing to be the architect for the purpose of this contract, such other person as shall be nominated for that purpose by the employer, (r) not being a person to whom the contractor shall object for reasons considered to be sufficient by the arbitrator mentioned in the said conditions. Provided always that no person subsequently appointed to be architect under this contract shall be entitled to disregard or overrule any decision or approval or direction given or expressed by the architect for the time being.

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Building
Contract
sanctioned
by the Royal
Institute.

4. ANY reference in the said conditions to the bills of quantities shall not have the effect of constituting them part of this contract. (s)

5. THE said conditions shall be read and construed as forming part of this agreement, and the parties hereto will respectively abide by and submit themselves to the conditions and stipulations and perform the agreements on their parts respectively in such conditions contained.

As witness our hands this day of 190 .

SCHEDULE OF CONDITIONS OF CONTRACT.

1. THE works shall be carried out in accordance with the directions and to the reasonable satisfaction of the architect, in accordance with the signed drawings and specification (t) and in accordance with such further drawings, details, instructions, directions, and explanations as may from time to time be given by the architect. If the work shown on any such further drawings or details, or necessary to comply with any such instructions, directions, or explanations, be, in the opinion of the contractor, extra to that comprised in the contract, he shall, before proceeding with such work, give notice in writing to this effect to the architect. In the event of the architect and contractor failing to agree as to whether or not there is any extra, and of the architect deciding that the contractor is to carry out the said work, the contractor shall accordingly do so, and the question whether or not there is any extra, and if so the amount thereof, shall, failing agreement, be settled by the arbitrator as provided in Clause 32, and the contractor shall be paid accordingly. The contract drawings and specification shall remain in the custody of the architect, and shall be produced by him at his office as and when required by the employer or by the contractor.

2. ONE complete copy of all drawings and of the specification shall be furnished by the architect free of cost to the contractor for his own use. The architect shall furnish to the contractor, within days after the receipt by him of a request for the same, any details which in the opinion of the architect are necessary for the execution of any part of the work, such request to be made only within a reasonable time before it is necessary to execute such work in order to fulfil the contract. Such copies and details shall be kept on the works until the completion thereof, and the architect or his representative shall at all reasonable times have access to the same, and they shall be returned to the architect by the contractor on the completion of the contract.

3. THE contractor shall on the signing hereof furnish the architect with a verified (u) copy of the original estimate for his sole use or that of the surveyor appointed as in Clause 13 hereof, and for the purposes only of this agreement.

(r) In *Kellett v. Moxon & Co. Ltd.* (1906), 73 J. P. 154, it was held that the duly appointed surveyor to the employer named in the contract had jurisdiction to determine the price to be paid for work which was begun before his appointment.

(s) As to the danger of the bill of quantities forming part of the contract, see p. 380.

(t) As to specifications, see p. 18, ante.

(u) The word "sealed" to be inserted if so agreed.

Copies of
drawings and
specification.

Copy of
estimate.

VIII.

Building Contract sanctioned by the Royal Institute.

Contractor to provide everything necessary.

Local and other authorities; notices, etc.

Setting out of work.

Materials, etc., to conform to specification.

Foreman.

Dismissal of workmen by architect.

Access for architect to works.

Clerk of works.

Variations and extras.

Errors in bills of quantities.

4. THE contractor shall provide everything necessary for the proper execution of the works, according to the true intent and meaning of the drawings and specification taken together, whether the same may or may not be particularly shown on the drawings or described in the specification, provided that the same is reasonably to be inferred therefrom; and if the contractor find any discrepancy in the drawings, or between the drawings and specification, he shall immediately refer the same to the architect, who shall decide which shall be followed. Figured dimensions are to be followed in preference to the scale.

5. THE contractor shall conform to the provisions of any Acts of Parliament relating to the works, and to the regulations and by-laws of any local authority, and of any water and lighting companies with whose systems the structure is proposed to be connected, and shall, before making any variation from the drawings or specification that may be necessitated by so conforming, give to the architect written notice, specifying the variation proposed to be made, and the reason for making it, and apply for instructions thereon. In case the contractor shall not in due course receive such instructions he shall proceed with the work, conforming to the provision, regulation, or by-law in question, and any variation so necessitated shall be dealt with under Clause 13.

6. THE contractor shall set out the works, and during the progress of the building shall amend at his own cost any errors arising from inaccurate setting out, unless the architect shall decide to the contrary.

7. ALL materials and workmanship shall be of the respective kinds described in the specification, and the contractor shall upon the request of the architect furnish him with vouchers to prove that the materials are such as are specified. (x)

8. THE contractor shall keep constantly on the works a competent general foreman, and any directions or explanations given by the architect to such foreman shall be held to have been given to the contractor.

9. THE contractor shall, on the request of the architect, immediately dismiss from the works any person employed thereon by him who may, in the opinion of the architect, be incompetent or misconduct himself, and such person shall not be again employed on the works without the permission of the architect.

10. THE architect and any person authorized by him shall at all reasonable times have access to the works, and the architect and his representatives shall at like times have access to the workshops of the contractor or other places where work is being prepared for the building.

11. THE clerk of works shall be considered to act solely as inspector and under the architect, and the contractor shall afford him every facility for examining the works and materials. (y)

12. THE contractor shall, when authorized by the architect, or as provided by Clause 5, vary by way of extra or omission from the drawings or specification; such authorization is to be sufficiently proved by any writing or drawing signed by the architect or by any subsequent written approval by him, but the contractor shall make no variation without such authorization (see p. 188). No claim for an extra shall be allowed unless it shall have been executed under the provisions of Clause 5, or by the authority of the architect as herein mentioned. Any such extra is hereinafter referred to as an authorized extra.

12a. SHOULD any error appear in the bills of quantities other than in the contractor's prices and calculations, it shall be rectified, and such rectification

(x) As to defective materials, see p. 36, *ante*.

(y) See *Graham v. Commissioners of Works*, Appendix, p. 670, noted *ante*, p. 88, as to architect's power to delegate to clerk of works.

shall constitute a variation of the contract, and shall be dealt with as hereinafter provided.

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13. No variation shall vitiate the contract; but all authorized extras for which a price may not have been previously agreed, and any omission which may have been made with the knowledge of the architect, or without his knowledge, provided he subsequently give a written sanction to such omission, shall be measured and valued, as hereinafter provided, by (a) . . . ; and a copy of the bill or statement of such measurement and valuation shall be given to the contractor. The fees for measuring and valuing the variations shall be added to the contract sum. If in the opinion of the architect the work cannot be properly measured and valued, day work prices shall be allowed therefor, provided that vouchers specifying the time and materials employed shall have been delivered for verification to the architect, or his nominee, at or before the expiration of the week following that in which such work shall have been done. The variations shall be valued at the rates contained in the priced bills of quantities, or, where the same may not apply, at rates proportionate to the prices therein contained. The amount to be allowed on either side in respect of the variations so ascertained shall be added to or deducted from the contract sum as the case may be.

Price for extras; how ascertained.

14. (a) The fee for the bills of quantities and the surveyor's expenses (if any) stated therein shall be paid by the contractor to the surveyor named therein out of and immediately after receiving the amount of the certificate or certificates in which they shall be included, (b) The fee chargeable under Clause 13 shall be paid by the contractor before the issue by the architect of the certificate for the final payment. If the contractor fails or neglects to pay as herein provided, then the employer shall be at liberty, and is hereby authorized, to do so on the certificate of the architect, and the amount so paid by the employer shall be deducted from the amount otherwise due to the contractor.

Table of quantities; expenses of.

15. When the contractor shall have received payment of any certificate in which the architect shall have stated that he has taken into account the value of any unfix'd materials intended for the works, and paid by the contractor thereon, or upon ground adjacent thereto, all such materials shall become the property of the employer, and shall not be taken away, except for the purpose of being used on the building, without the written authority of the architect; and the contractor shall be liable for any loss of or damage to such materials.

Unfix'd materials when taken into account to be property of employer.

16. The architect shall, during the progress of the works, have power to order in writing from time to time the removal from the works, within a reasonable time or times as may be specified in the order, of any materials which in the opinion of the architect are not in accordance with the specification or the instructions of the architect, the substitution of proper materials, and the removal and proper re-execution of any work executed with materials or workmanship not in accordance with the drawings and specification or instructions; and the contractor shall forthwith carry out such order at his own cost. In case of default on the part of the contractor to carry out such order, the employer shall have power to employ and pay other persons to carry out the same; and all expenses consequent thereon or incidental thereto shall be borne by the contractor, and shall be recoverable from him by the employer, or may be deducted by the employer from any moneys due or that may become due to the contractor.

Power to architect to order removal of improper work.

(c) Insert "the architect," or the name of a surveyor.

Note. In case where the surveyor is engaged by the employer to be paid direct by him the first sentence of this clause will come out.

(d) As to employment of quantity surveyor, see p. 14, ante.

(e) As to how far the architect may deduct from due to the clerk of the works, see *Green v. Colquhoun*, 11 H. L. 419, 12 A. & E. 119, 12 Q. B. 188.

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Defects after
completion.

17. ANY defects, (*d*) shrinkage, or other faults which may appear within months from the completion of the works, arising in the opinion of the architect from materials or workmanship not in accordance with the drawings and specification or the instructions of the architect, or any damage to pointing by frost appearing within the like period, shall upon the directions in writing of the architect, and within such reasonable time as shall be specified therein, be amended and made good by the contractor at his own cost, unless the architect shall decide that he ought to be paid for the same; and in case of default the employer may employ and pay other persons to amend and make good such defects, shrinkage, or other faults or damage, and all expenses consequent thereon or incidental thereto shall be borne by the contractor and shall be recoverable from him by the employer, or may be deducted by the employer from any moneys due or that may become due to the contractor. Should any defective work have been done or material supplied by any sub-contractor employed on the works who has been nominated or approved by the architect, as provided in Clause 20, the contractor shall be liable to make good in the same manner as if such work or material had been done or supplied by the contractor, and been subject to the provisions of this and the preceding clause. (*e*)

Work to be
opened up at
request of
architect.

18. THE contractor shall, at the request of the architect, within such time as the architect shall name, open for inspection any work covered up; and should the contractor refuse or neglect to comply with such request, the architect may employ other workmen to open up the same. If the said work has been covered up in contravention of the architect's instructions, or if on being opened up it be found not in accordance with the drawings and specification or the instructions of the architect, the expenses of opening and covering it up again, whether done by the contractor or such other workmen, shall be borne by, and recoverable from, the contractor, or may be deducted as aforesaid. If the work has not been covered up in contravention of such instructions, and be found in accordance with the said drawings and specification or instructions, then the expenses aforesaid shall be borne by the employer and be added to the contract sum: provided always that in the case of foundations, or of any other urgent work so opened up and requiring immediate attention, the architect shall, within a reasonable time after receipt of notice from the contractor that the work has been so opened, make or cause the inspection thereof to be made, and at the expiration of such time, if such inspection shall not have been made, the contractor may cover up the same, and shall not be required to open it up again for inspection except at the expense of the employer.

Assignment or
sub-letting.

19. THE contractor shall not, without the written consent of the architect, assign this agreement or sub-let any portion of the works.

Sub-con-
tractors.

20. ALL specialists, merchants, tradesmen, or others executing any work, or supplying any goods for which prime cost prices or provisional sums are included in the specification, who may at any time be nominated, selected, or approved by the architect, are hereby declared to be sub-contractors employed by the contractor; but no such sub-contractor shall be employed upon the works against whom the contractor shall make what the architect considers reasonable objection, or who will not enter into a contract with the contractor upon terms and conditions consistent with those in this contract, (*f*) and securing the due performance and maintenance of the work supplied or executed by such sub-contractor, and indemnifying the contractor against any claims arising out of the misse by the sub-contractor or his workmen of any scaffold erected or plant employed by the contractor, or that may be made against the contractor

(*d*) As to defects, see p. 110, *ante*.

(*e*) As to default or delay of sub-contractor, see p. 41, *ante*.

(*f*) See p. 42, *ante*.

in consequence of any act, omission, or default of the sub-contractor, his servants or agents, and against any liability under the Workmen's Compensation Act, 1897, or any amendment thereof. (g)

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21. The contractor shall be responsible for all structural and decorative damage to property, and for injury caused by the works or workmen to persons, animals, or things, and shall hold the employer harmless in respect thereof, and also in respect of any claim made under the Workmen's Compensation Act, 1897, or any amendment thereof, by any person in the employ of the contractor. He shall also be responsible for all injuries caused to the buildings, the subject of this contract, by frost or other inclemency of weather, (h) and shall reinstate all damage caused by the same, and thoroughly complete the whole of the works.

Damage to person and property.

22. (a) (a) The contractor shall insure the works, and keep them insured until they are delivered up, against loss or damage by fire, in an office to be approved by the architect, in the joint names of the employer and contractor, for the full value of the works executed, and shall deposit with the architect the policies and receipts for the premiums paid for such insurance; and in default the employer may insure the works and deduct the premium paid from any moneys due or which may become due. All moneys received under any such policies are to be paid to the contractor by instalments on the certificates of the architect, and to be applied in or towards the rebuilding or reparation of the works destroyed or injured. The contractor shall, as soon as the claim under the policy is settled, proceed with all due diligence with the rebuilding or reparation, and shall not be entitled to any payment in respect thereof other than the said moneys received, but such extension of the time hereinafter mentioned for completion shall be made as shall be just and reasonable. (b) The whole building and the works executed under this contract shall be at the sole risk of the employer as regards any loss or damage by fire, and in the event of any such loss or damage being so occasioned which affects the original building or structure in addition to the new work, the contractor shall be entitled to receive from the employer the full value of all work then executed and materials then delivered, calculated in the manner provided for by Clause 13 hereof, and this contract, so far as it relates to any subsequent work, may at the option of either party be determined if in the opinion of the arbitrator such determination shall be just and equitable.

Insurance.

23. Possession of the site (or premises) shall be given to the contractor on or before the day of . He shall begin the works immediately after completion of such possession, shall regularly proceed with them, and shall complete the same (except painting and papering or other decorative work which in the opinion of the architect it may be desirable to delay) by the day of , subject nevertheless to the provisions for extension of time hereinafter contained. (k)

24. If the contractor fail to complete the works by the date named in Clause 23, or within any extended time allowed by the architect under these presents, and the architect shall certify in writing that the works could reasonably have been completed by the said date, or within the said extended time, the contractor shall pay or allow to the employer the sum of sterling per (l) as liquidated and ascertained damages for every (l) beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, except as provided by Clause 23, and such damages may be deducted by the employer from any moneys due to the contractor.

Damages for non-completion.

(g) As to rights of sub-contractors on builder's bankruptcy, see p. 168, *ante*.

(h) See p. 141, *ante*.

(i) Note. In this clause division (a) applies to a new building and division, (b) to an existing building to be altered. (a) or (b) should be struck out to suit circumstances.

(k) As to delay by employer in giving possession of the site, see pp. 37, 118, *ante*.

(l) Insert "day" or "week" as may be agreed.

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Extension of
time.

Suspension
of works by
contractor.

25. (m) If in the opinion of the architect the works be delayed *force majeure* or by reason of any exceptionally inclement weather, or by reason of instructions from the architect in consequence of proceedings taken or threatened by or disputes with adjoining or neighbouring owners, or by the works or delay of other contractors or tradesmen engaged or nominated by the employer or the architect, and not referred to in the specification, or by reason of authorised extras or additions, or in consequence of any notice reasonably given by the contractor in pursuance of Clause 1, or by reason of any local combination of workmen or strike or lock-out affecting any of the building trades, or in consequence of the contractor not having received in due time necessary instructions from the architect for which he shall have specifically applied in writing, the architect shall make a fair and reasonable extension of time for completion in respect thereof. In case of such strike or lock-out the contractor shall, as soon as may be, give to the architect written notice thereof. But the contractor shall nevertheless use his best endeavours to prevent delay, and shall do all that may reasonably be required to the satisfaction of the architect to proceed with the works.

26. If the contractor, except on account of any legal restraint upon the employer preventing the continuance of the works, or on account of any of the causes mentioned in Clause 25, or in case of a certificate being withheld or not paid when due, shall suspend the works, or in the opinion of the architect shall neglect or fail to proceed with due diligence in the performance of his part of the contract, or if he shall more than once make default in the respects mentioned in Clause 16, the employer by the architect shall have power to give notice in writing to the contractor requiring that the works be proceeded with in a reasonable manner and with reasonable dispatch. Such notice shall not be unreasonably or vexatiously given, and must signify that it purports to be a notice under the provisions of this clause, and must specify the act or default on the part of the contractor upon which it is based. After such notice shall have been given, the contractor shall not be at liberty to remove from the site or works, or from any ground contiguous thereto, any plant or materials belonging to him which shall have been placed thereon for the purposes of the works; and the employer shall have a lien upon all such plant and materials, to subsist from the date of such notice being given until the notice shall have been complied with. Provided always that such lien shall not under any circumstances subsist after the expiration of thirty-one days from the date of such notice being given unless the employer shall have entered upon and taken possession of the works and site as hereinafter provided. If the contractor shall fail for days after such notice has been given to proceed with the works as therein prescribed, the employer may enter upon and take possession of the works and site, and of all such plant and materials thereon (or on any ground contiguous thereto) intended to be used for the works, and all such materials as above mentioned shall thereupon become the property of the employer absolutely, and the employer shall retain and hold a lien upon all such plant until the works shall have been completed under the powers hereinafter conferred upon him. If the employer shall exercise the above power he may engage any other person to complete the works, and exclude the contractor, his agents and servants, from entry upon or access to the same, except that the contractor or any one person nominated by him may have access at all reasonable times to inspect, survey, and measure the works. And the employer shall take such steps as in the opinion of the architect may be reasonably necessary for completing the works without undue delay or expense, using for that purpose the plant and materials above mentioned in so far as they are suitable and adapted to such use. Upon the completion of the works the architect shall certify the amount of the expenses properly incurred consequent on and incidental to the default of the contractor as aforesaid, and in completing the works by other persons. Should the amount so certified as the expenses properly incurred be less than the amount

(m) See generally, p. 142, *ante*.

which would have been due to the contractor upon the completion of the works by him, the difference shall be paid to the contractor by the employer; should the amount of the former exceed the latter, the difference shall be paid by the contractor to the employer. The employer shall not be liable to make any further payment or compensation to the contractor for or on account of the proper use of the plant for the completion of the works under the provisions hereinafore contained other than such payment as is included in the contract price. After the works shall have been so completed by persons other than the contractor under the provisions hereinafore contained, the employer shall give notice to the contractor of such completion and may require him from time to time, before and after such completion, to remove his plant and all such materials as of itself as may not have been used in the completion of the works from the site. If such plant and materials are not removed within a reasonable time after notice shall have been given, the employer may remove and sell the same, holding the proceeds, less the cost of the removal and sale, to the credit of the contractor. Any notice to be given to the contractor under this clause shall be given by leaving the same at the place of business of the contractor, or by registered letter sent to him at that address.

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27. The words "prime cost" or the initials P.C. applied in the specification to goods to be delivered and fixed by the contractor, shall mean, unless otherwise stated in the specification, the sum paid to the merchant after deducting all trade discount for such goods in the ordinary course of delivery, but not deducting discount for cash, and such sum shall be exclusive of special carriage, the cost of fixing, and contractor's profit.

"Prime cost,"
meaning of.

28. The provisional sums mentioned in the specification for materials to be supplied or for work to be performed by special artists or tradesmen, or for other works or fitting to the building, shall be paid and expended at such times and in such such amounts and to and in favour of such persons as the architect shall direct, and sums so expended shall be payable by the contractor without discount or deduction, or (without prejudice to any rights of the contractor existing under the contract referred to in Clause No. 20) by the employer to the said artists or tradesmen. The value of works which are executed by the contractor in respect of provisional sums, or in additional works, shall be ascertained as provided by Clause 13. As the settlement of the accounts the amount paid by the contractor to the said artists or tradesmen, and the said value of such works executed by the contractor, shall be set against all such provisional sums or any sum provided for additional works, and the balance, after allowing *pro rata* for the contractor's profits at the rates contained in the contractor's original estimate, shall be added to or deducted from the contract sum, provided that in estimating the amounts paid as last herein provided no deductions shall be made by or on behalf of the employer in respect of any damages paid by the sub-contractor to the contractor, the intention being that the contractor and not the employer shall have the benefit of any such damages. (n)

Provisional
sums.

29. The contractor shall permit the execution of work by any other artists or tradesmen who may be engaged by the employer.

Artists, etc.,
engaged by
employer.

30. The contractor shall be entitled under the certificate (a) to be issued by the architect to the contractor, and within days of the date of each certificate, to payment by the employer from time to time by instalments, when in the opinion of the architect work to the value of £ (or less at the reasonable discretion of the architect) has been executed in accordance with the

Payment and
certificate.

(n) For a form of clause giving the architect power to order payment to sub-contractors direct on failure by the contractor, see *Form Works, 1st part Form* (1905), 2 K. R. 713, at p. 715, noted *ante*, p. 168.

(o) As to the effect of conditions requiring certificates, see p. 101, *ante*. As to the desirability of expressly requiring certificates to be in writing, see p. 100, *ante*.

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contract, at the rate of £ per cent. of the value of work so executed in the building, until the balance retained in hand amounts to the sum of £ after which time the instalments shall be up to the full value of the work subsequently executed. The contractor shall be entitled, under the certificate to be issued by the architect, to receive payment of £ being a part of the said sum of £ when the works are practically completed, and in like manner to payment of the balance within a further period of months, or as soon after the expiration of such period of months as the works shall have been finally completed, and all defects made good according to the true intent and meaning hereof, whichever shall last happen. The architect shall issue his certificates in accordance with this clause. No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement. (p) The contractor when applying for a certificate shall, if required, as far as practicable, furnish to the architect an approximate statement of the work executed, based on the original estimate.

Non-payment;
by employer.

31. SHOULD the employer not pay the contractor any sum certified by the architect within the times respectively named in Clause 30, the contractor shall give written notice to the employer of the non-payment, and should the employer not pay any such sum within the period of days from the date of delivery of such notice at the employer's address or sent to him there in the ordinary course of post by registered letter, or if the employer shall become bankrupt or file any petition for liquidation of his affairs, and if his trustee in bankruptcy shall repudiate this contract, or if the trustee shall be unable to show within days to the reasonable satisfaction of the contractor his ability to carry out the contract, and to make all payments due or to become due thereunder, or if the works be stopped for months under an order of the architect or any court of law, the contractor shall be at liberty to determine the contract by notice in writing to the architect, and to recover from the employer payment for all work executed and for any loss he may sustain upon any plant or material supplied or purchased or prepared for the purpose of the contract. In arriving at the amount of such payment the rates contained in the contractor's original estimate shall be followed, or, where the same may not apply, rates proportionate to the prices therein contained. (q)

Arbitration.

32. (r) PROVIDED always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract or as to any matter or thing arising thereunder (except as to the matters left to the sole discretion of the architect under Clauses 4, 9, 16, and 19, and the exercise by him under Clause 18 of the right to have any work opened up), or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and the final decision of , or, in the event of his death or unwillingness or inability to act, of , or, in the event of his death or unwillingness or inability to act, of a person to be appointed on the request of either party by the president for the time being of the Royal Institute of British Architects, and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the question of certificate, shall not be opened until after the completion or alleged completion of the works, unless with the written consent of the employer or architect and the contractor. The arbitrator

(p) See *School Board for London v. Johnson*, noted *ante*, p. 36.

(q) See p. 169, *ante*.

(r) See *Robins v. Goddard* (1905), 1 K. B. 294, noted *ante*, p. 98.

shall have power to open up, review, and revise any certificate, opinion, decision, requisition, or notice, save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition, or notice had been given. Upon every or any such reference the costs of and incidental to the reference and award respectively shall be in the discretion of the arbitrator, who may determine the amount thereof, or direct the same to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1889.

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IX.

CLAUSE AS TO VARIATIONS *not extending time or altering contract.*

A very stringent form will be found set out at length in the reports of *Jones v. St. John's College*, L. R. 6 Q. B. 115; 40 L. J. Q. B. 80.

IX.
Clause as to Variations.

X.

PROVIDE for the forbearance of the penalty to be incurred by not completing the building within the given time, if in the mean time it be destroyed by accident.

"*PROVIDED ALWAYS, that in case the said intended building shall be damaged, burnt down, or destroyed by or by means of fire, storm, or tempest, at any time before the same shall be completely finished and fit for habitation, then, and in such case, the penalty to be incurred for not finishing the said building on or before the said day of shall not become payable by the bidder, any thing herein contained to the contrary notwithstanding; but no such accident or event shall be deemed to effect a revision, annulment, suspension, alteration, or qualification of this contract with respect to the erecting and completing the said house and works, any further or otherwise than with respect to the time hereby limited for completing the same.*"

X.
Proviso as to Penalty.

Waiver of penalty in case of accident, etc.

XI. A.

CONTRACT between employer and builder (suitable to extensive work) for the erection of several distinct buildings described in separate specifications. The contract comprises the following documents: A. The Agreement. B. The General Building Conditions (part, p. 393). C. The Specifications (part, p. 398). D. The Schedule of Prices. (1)

XI. A.
Building Contract for Extensive Works.

AN AGREEMENT made the _____ day of _____ BETWEEN A. B. etc. (herein called the Builders) of the one part, and [employer] of the other part.

Partners.
Recitals.

WHEREAS the Builders have agreed to execute certain works at _____ according to drawing and specifications prepared by Mr. _____, architect, for the sum of £ _____, that is to say:

1. For the erection of _____ described in Specification No. 1, and shown on the drawings therein referred to, the sum of £ _____.

(1) The schedule of prices must be based upon, and contain all the items in, the bill of quantities.

XI. A.

[*Recite also as to the erection of works, etc., described in Specifications Nos. 2, 3, and 4.*]

**Building
Contract for
Extensive
Works.**

AND WHEREAS certain general conditions to be observed in the conduct of the works, and a schedule of prices (which is referred to in the 7th article of the condons), have also been prepared.

AND WHEREAS the drawings referred to in Specifications 1, 2, and 3, and copies of the specifications, condons, and schedule of prices have been examined and signed by the blders and architect previously to and with reference to this present contract.

NOW IT IS HEREBY AGRD between the parties hrtw as follows :

**Agreement
to build.**

1. THE blders shall forthwith proceed to execute and complete the work and all things necessary or proper to be done in and about the same in a thoroughly sound, substantial, and workmanlike manner, conformably to the specifications, drawings, and condons, and to the intention which may be reasonably inferred thrfm, and accordg to such farther instrons and such explanatory drawings as may under the provisions of the conditions be given and provided by or other the architect for the time being of the sd [employer] (hrtw called the architect) during the progress of the work, and under the inspection and to the entire satisfn of such architect; and shall, on or before the days named in the 3rd article of the conditions, or on or before such further day as may under the provision of the conditions be fixed for the completion of the work, deliver up the work comprised in each specificon, in a complete, sound, perfect, and clean state and condition in every respect; and shall observe, perform, abide by, and submit to all and singular the obligons, provisions, and regulons in the specificons and condons resply contd or from the same resply to be reasonably and fairly inferred. (u)

**Builders will
insure.**

2. THE blders shall forthwith insure and keep insured, during the continuance of the contract, from loss or damage by fire, in such public insurance office or offices as the sd [employer] shall approve, the works included in Specifications Nos. 1, 2, 3, and 4 resply, in such sums as the architect shall from time to time direct.

**Agreement'
by employer
to pay instal-
ments of con-
tract price.**

3. THE sd [employer] shall, if the blders well and truly perform and observe all the several stipulations and conditions hrtw contd, or referred to on their part to be performed, pay unto the blders the sums hrtwfc mentd by the instalmts at the times and in manner mentd in the condons, subject to such dedons (if any) in respect of sums and quantities as in the specification or conditions are mentioned.

**Sums agreed
to be paid to
be accepted
as full com-
pensation.**

4. THE sums hrtw agrd to be pd to the blders shall be considered and accepted by them as a full compenson for executing and completing the whole of the works described in the specifications and shown on the drawings, and all other works, matters, and things necessary to complete the same, and to be fairly inferred from the said drawings or specificons, whether the same are therein expressly shown and mentd or not, and no charge or demand shall be made or allowed under any pretence whatsoever for any materials that may have been rejected nor for making good any work that may be found defective or imperfect.

(u) The following clause is now sometimes inserted (as to which, see *ante*, p. 15) :

**Rectification
of errors in
the bill of
quantities.**

"If any errors shall be discovered in the detailed bills of quantities, the same shall be rectified, and an addition to or deduction from the amnt payable to the blders under or by virtue of this agrmnt shall be made accordingly; provided always, that the blders shall notify in writing to the architects the discovery of any such error within _____ days from the date hrtw, after which time no question as to the accuracy or otherwise of the said bills of quantities shall be entertained."

5. The Bidders shall make all such alterations and additions to or omissions and deviations from the drawings and specifications in completing the work as shall from time to time be required or directed and sanctioned in writing by the [employer] or the architect as provided in the conditions, and at or for the price specified in the said schedule of prices, and every such addition, alteration, or deviation shall be subject to like agrmts with respect to material, workmanship, and otherwise, as are hereinafter provided with respect to the work already specified in the said schedule of prices, and as if such addition, alteration, or deviation had formed part of and been shown and specified in the drawings and specifications, and that no such alteration, addition, omission, or deviation as aforesaid shall alter or affect the provisions, agrmts, and conditions hereinafter contained or referred to otherwise than as necessarily consequent on such alteration, addition, omission, or deviation reply. (y)

IN WITNESS, ETC.

XI. A.

Building Contract for Extensive Works

Architect, Engineer, and Surveyor.

XI. B.

GENERAL CONDITIONS OF CONTRACT. (z)

(Forming part of the agreement set out in Form XI. A., supra.)

1. THE expression "the architect" used in these conditions, or in the agrmt, specifications, schedule of prices, or drawings, shall mean [the present architect] or other the architect for the time being of [employer].

2. THE contract sum is to include all and every expense necessary for the completion of the work as described in the specifications and shown on the drawings or to be reasonably inferred therefrom, except such portions as are specially recd to be left incomplete. The architect is to furnish for the use of the bidder detail-drawings of such portions of the work as shall require further explanation.

Contract price to include all expenses

Architect to furnish other detail-drawings.

3. THE work is to be commenced immediately upon order given by the architect to the Bidders, and is to be carried on and completed in every respect to the satisfaction of the architect as to the works comprised in Specification No. 1, on or before the day of ; as to the works comprised in Specification No. 2, on or before, etc.; and as to the works comprised in Specification No. 4, on or before such reasonable time as shall be hereafter appointed by the architect. And in the event of the work not being so completed on the days hereby respectively fixed for its completion, or in the case of an extension of time under any provision contained in these conditions, then, within such further time as shall under such altered circumstances be allowed for the completion of the work, the Bidders shall pay to the said [employer] for each and every week exceeding the respective dates hereby fixed upon for such completion until the work is so completed, as liquidated damages and not as a penalty, without prejudice to any of the conditions herein contained, the sum of £ , and a rateable proportion of £ for any part of a week, unless the said [employer], on a motion of any court which may have arisen, shall determine to remit such payment or payments or any part thereof. And in case the Bidders shall be required to do any additional work or works not at present contemplated, they shall be allowed an extension of time for completion in the proportion of one week for every £ worth of work. The Bidders are to keep the work in repair for twelve months after its completion.

Work in each specification to be completed by fixed time.

In default bidder to forfeit £ as liquidated damages for each week.

Extension of time.

4. FROM the commencement to the completion of every part of the work the Bidders to keep the same and all materials and things upon or near the premises, whether placed on or in repair.

Bidders to keep work in repair.

(x) See p. 143, ante.

(y) As to extension of time in consequence of alterations, see Cl. 3 of F. M. B.

(z) For an instance of a case in which there was a variation between a clause in the contract and the general conditions, see *Archer v. Tarrant* (1883), 25 Q. B. Rep. 573, cited ante, p. 32.

XI. B.

Building
Contract for
Extensive
Works.

Works and
materials
to become
property of
employer.

the works or not, shall be deemed to be and shall become the property of the sd [employer], (a) but he shall not be responsible, charged, or chargeable for anything lost, stolen, damaged, or destroyed, or removed from the blding, or that shall fail in any way whatever; and the care of the same and everything connected therewith or appertaining thereto shall be with the blders, who shall protect and preserve entire and uninjured the whole of the sd work and materials; and if any injury or disfigurement shall be done thereto by fire or by the inclemency of the weather, or by accident of any description, or by the workmen employed, or by any other means whatsoever, then, and in every such case, the blders shall completely repair or replace the same, as the case may be, at their own cost, so that on the completion of the work every part thereof may be perfect and in a clean state.

Workmanship
and materials.

5. EVERY part of the work shall be executed as directed by the specificons, and in the most sound, workmanlike, and substantial manner, and all materials used in the constron of the blding shall be new and the best of their respive kind, except where otherwise distinctly directed or allowed in and by the specificons.

Drawings and
specifications
to be taken
together to
explain each
other.

6. The drawings and specificons shall be taken together to explain each other accordg to their true intent and meaning, and if anything shall have been omitted, either in the specificons or drawings, which shall be reasonably inferred therefrom, as necessary for the proper completion of any part or parts of the work, the blders shall provide materials and labour for the same at their own cost, as if it had been more particularly described or shown, and shall supply whatever may be required to complete the whole in a workmanlike manner. If the blders consider that any detail-drawing furnished to them by the architect shows work exceeding in value the work shown on or to be reasonably inferred from the contract plans and specificons, they are at once to return the said detail-drawing to the architect with a request that he will reconsider it. And if the detail-drawing shall not be so returned before the commencement of the work shown thereon, the blders shall not be entitled to any extra allowance in respect of any such excess.

Alterations,
additions,
or omissions.

7. No alterons, additions, or omissions shall be made without an order in writing signed by the architect, and such alterons, additions, and omissions so ordered shall not invalidate the contract, but the value of the sd alterons, additions, or omissions shall be ascertained and added to, or deducted from, the amt of the contract, as the case may be, in accordance, as far as practicable, with the schedule of prices annexed to the contract, such prices being the value of the several works complete, and to include all superintendence, labour, and materials of the several kinds as described in the specificons, and all carriage, delivery, fixing, and use of all scaffolding, tools, plant, that may be necessary, or ordered, and all maintenance, risks, and contingencies, and every other incidental expense. If, however, any addition or alteron so ordered shall involve extra cost, the blders are not to proceed to execute any of such additions or alterons unless and until they shall have received an order in writing under the hand of the architect, (b) being upon Form A annexed to the contract, and without such order the blders will not be paid for such additions or alterons. All accounts for day work shall be delivered to the architect or clerk of the works on Form B annexed to the contract, not later than Tuesday in every week, and shall be verified to the satisfaction of the architect within 7 days after such delivery, and unless so delivered and verified, no such accounts will be entertained.

Form for
extra work.
Form for
accounts of
daywork.

8. [*Builders not to let out work, etc.* Insert Cl. 9 of F. VI., p. 378.]

Scaffolding.

9. THE blders are to provide all necessary scaffolding and plant, erected in the

(a) The effect of a clause of this kind upon "reputed ownership" was considered in the case of *Re Keen, Ex parte Collins* (1902), 1 K. B. 555, noted *ante*, p. 176.

(b) Fill in here whether by employer or by architect; and see as to this, note to Cl. 6, F. VI., p. 376.

most approved manner, so that the work can at all times be completely examined by the architect or clerk of the works.

XI. B.

Building Contract for Extensive Works.

10. The architect is to be at liberty to direct the bidders to execute any part or parts of the work before any other part or parts thereof, and he is to have authority to judge of the manner of executing every part of the work, and of the quality of the materials used or intended to be used therein.

Architect may direct part of work to be done before other part.

11. No materials, scaffolding, or other thing will be allowed to be removed from the ground unless an order in writing to that effect be given by the architect.

No materials, etc., to be removed.

12. The architect shall have full power to require the bidders immediately to dismiss any workmen, watchmen, doerkeeper, or other servant of the bidders who shall, in the opinion of the architect misconduct himself, or who in the architect's opinion is incompetent, and the bidders shall forthwith comply with such requirements.

Architect may require dismissal of workmen, etc.

13. [*Builders to keep fire-ten.* Insert Cl. 10 of F. VI., p. 378.]

14. The bidders or their foremen shall always attend at the bidding, except when required at the office of the architect.

Attendance at building.

15. The bidders shall pay the workmen employed on the work at the bidding, and not elsewhere.

Payment at building.

16. The bidders are to suspend the work during frost or inclement weather upon receiving a notice in writing to that effect from the architect, but the time during which the work shall be so suspended shall be added to the time within which the work is contracted to be completed.

Suspension of work during frost, etc.

16a. [*Liability for extraordinary traffic.* Insert clause in note to Cl. 11 of F. VI., p. 379.]

17. In case the architect or the clerk of the works shall have given notice to the bidders that any part of the work must be inspected previously to the same being covered or hidden, the bidders shall give 24 hours' notice in writing to the architect before any such work shall be so covered or hidden, and in case any work shall be so covered or hidden without written authority from the architect, the bidders may be required to uncover the same at their own expense.

Inspection of work before covered in.

18. The bidders shall provide proper day and night watchmen and doerkeepers, whose wages shall be borne and paid by the bidders, and also during the nights proper and sufficient fires and lights.

Builder to provide watchmen.

19. [*Builders to remove rubbish.* Insert Cl. 6 of F. VII., p. 380.]

20. The architect shall furnish copies of the specification and contract-drawings for the use of the bidders. (c) The detail-drawings, when provided by the architect, will be kept at the [state where], where the bidders may copy or refer to them, and they are not to be removed from [the office of the works].

Copies of specifications, etc., to be kept at building.

(c) If it is desired that improper work shall be removed, add here Cl. 5 of F. VI., p. 376.

(c) The importance to the architect of inspecting work before it is covered up is illustrated by the case of *James v. Smith* (1851), 4 F. 1211, note, p. 78.

(c) If there is any arrangement as to the cost, state it here.

XI. B.

Building
Contract for
Extensive
Works.

Payments
to be made
to builders.

Payments on
certificate.

Accounts of
work, etc., to
be furnished
previously to
payments.

Certificate on
completion.

Progress
certificate not
to prejudice
in final
settlement.

Builders to
deliver up
work com-
plete, etc., on
day named.

Provision
in case of
strikes, etc.

Power to
suspend any
portion, or,
the whole, of
the work, or,
to determine
contract.

21. THE bldrs shall be entitled to be pd as follows: [£80] per cent upon the amount of work executed and materials delivered on the ground to the satisfaction of the architect, and the balance of [£20] per cent. on such amount shall be reserved for subsequent paymt in manner hereinafter mentd until the sum so reserved shall be £ , after which time the bldrs shall be entitled to be paid for the full amnt of the work executed and materials delivered to the architect's satisfaction. At the end of 6 mos after the completion of the whole work to the satisfaction of the architect, the bldrs shall be entitled to be pd $\frac{1}{2}$ of the sum so reserved as afd, and at the end of 12 mos after the completion of the work as afd the bldrs shall be entitled to be pd the residue of such reserved sum (subject to the work being in the judgmt of the architect in a satisfactory state at those periods resply). (f)

22. No paymts as afd shall be made to the bldrs except on the certe of the architect in writing, and no paymt shall be made to the bldrs of a sum less than £ .

23. DETAILED bills or accounts of work done and materials delivered, priced in conformity with the schedule of prices annexed to the contract (so far as such schedule may be applicable), shall from time to time be prepared by the bldrs and delivered to the architect 7 days at least previously to any sum being required to be pd to the bldrs. And thrupon the architect shall certify in writing to the sd [employer] the sum to which the bldrs are entitled under Article 21 of these conditions. The architect shall likewise certify in writing the state of the work at the end of 6 mos and 12 mos resply after its completion, with a view to the builders receiving the sums mentd as payable at those periods resply.

24. THE paymts made from time to time to the bldrs during the progress of the work shall be held to be paymts generally on account of the contract sum, and the certes of the architect on which such paymts are based shall be held to have been given only for the purpose of fixing the sums to be so pd and shall not in any way prejudice the sd [employer] in the final settlement of account, in case it should appear that too much had been paid to the bldrs during the progress of the work. (g)

25. [*Power of employer to terminate contract in case of default of builders. (h)* Insert Cl. 13 of F. VI., p. 378.]

26. THE bldrs shall deliver up the whole of the work comprised in each specification complete on or before the days named in Article 3 of these condons: or in case of an extension of time under any provision contd in these condons, then within such further time as shall under such altered circes be allowed for the completion of the work, in a perfect state, with all scaffolding, surplus materials, rubbish, etc., cleared away and removed.

27. IN case of any delay in the exon of the work caused by a general strike, combination, or lock-out of artificers or workmen employed in any of the blding trades in , or of workmen [in the provinces] employed in the preparation or manufacture of materials intended for the work, the bldrs shall be allowed such further time for the exon of the contract as shall be appointed and certified to in writing by the architect at the time of such extension of time being granted, but no such further time shall be allowed unless the sd certe is then obtained.

28. THE sd [employer] shall have full power at any time, and from time to time, to suspend the exon of the work, or any portion of the work, or to determine the contract altogether; but if such suspension or determination shall not have been occasioned by the default of the bldrs, they shall be entitled to receive such reasonable and just compenson for any loss which they may thrby sustain as the architect may deem just, and shall certify to in writing.

(f) See also F. VI., Cl. 8, p. 377; F. VII., Cl. 10, p. 381.

(g) As to distinction between "progress" certificates and "final," see pp. 94, 105, *ante*.

(h) See another form, F. VIII., Cl. 26, p. 388.

29. The [employer] shall at all times have access to the building works, and shall have full power at any time to execute other works contemporaneously with the work under the contract. The builders shall give reasonable facilities for such purpose, so, however, that the work be not impeded.

XI. B

Building Contract for Extensive Works

30. [Liability for accidents, etc. See F. VI., Cl. 14, p. 379; F. XI. B., Cl. d., *infra*.]

Employer to have access to building, and power to execute other works.

31. [Arbitration clause, F. XII., p. 398.]

The general conditions contained in this and the preceding sheets (each being initialed), are those which are referred to in the contract entered into between _____ of the one part, and _____ of the other part, and dated _____ (i)

Date

Signatures

The following are some additional or alternative clauses which can be added, if required, to this form.

a. All measurements shall be made by the architect, and be subject to his decision and determination; all voids shall be deducted, and all measurements taken net, and strictly in accordance with geometric rules, whatever be the nature of the work, any local, or trade, or other custom or usage to the contrary notwithstanding.

Measurements.

b. The builders shall, at their own expense, make such provision for the accommodation and protection of foot passengers, and of the owners and occupiers of the adjacent houses and premises, as may be required, in the form of bridge ways, guards, and fences, and shall cause as little inconvenience and interruption to the street traffic as possible, and will be held responsible for the consequences of any stoppage or interruption of the traffic beyond what in the judgment of the architect may have been absolutely necessary and unavoidable.

Provision for foot passengers during execution of works. Liability for stoppage of traffic, etc.,

c. The builders shall, at their own expense, properly shore up, and support, to the satisfaction of the architect, all chimneys, walls, vaults, ceilings, ovens, areas, railways, drains, sewers, drains, water and gas and other pipes, as may be, or may be likely to be, affected, endangered, or disturbed by the works, and which may be in the line thereof, or contiguous to them.

Shoring up buildings adjoining.

d. The builders shall take upon themselves and bear the risk of executing the whole and every part of the works, according to the drawings, specification, general conditions and direction of the architect, and shall guarantee and be liable for the completion and stability thereof, and shall keep the same in repair for a period of _____ calendar months from the certified completion thereof; and the builders shall also be liable to, and make good, all accident or damage, whether to the works, or to the adjacent buildings, chimneys, or streets, (1) or to any gas, water, or other pipes, which may be interrupted or interfered with during the execution of such works (so far as any damage may have been occasioned thereby for _____ calendar months after the same are completed and delivered over to [employer]. [See another form as to accidents, F. VI., Cl. 14, p. 379.] The builders shall take up and relay any such pipes which it may be necessary to remove in the execution of the contract to the satisfaction of the officer, or person appointed for the purpose by _____; and also shall pay any charges for gas or water which may be wasted. The builders so soon as the works are completed as herein provided shall, at their own expense, clear away and remove all scaffolding, plant, tools, machinery,

Contractor shall bear risk of executing works, and keep in repair for certain time, and be liable for all accidents, etc., and shall take up and relay any necessary pipes, and shall remove all scaffolding, etc., and rubbish, and leave the works in satisfactory condition.

(i) The specifications and drawings, etc., will also have a memorandum to this effect.

(4) As to liability for damage caused by extraordinary traffic on a highway, see *Ex p. m. U. D. C. v. L. C. C.* (1890), 2 Q. B. 741, and other cases noted *ante*, p. 213.

XI. B.
Building
Contract for
Extensive
Works.

utensils, board, fencing, rubbish, and any unappropriated materials and things which may be lying about the works, or on the adjoining lands or streets, and shall do everything necessary to finish off the works in the most complete and workmanlike manner both in appearance and effect, and shall leave the same in a sound and satisfactory condition at the expiration of the period herein mentd.

XI. C.
Specification.

XI. C.

SPECIFICATION to be observed by the builders in constructing and completely finishing and appurtenances, in

1. THE contract comprises and includes all the work required in the formation, erection, construction, and completion of _____, in _____, in the county of _____, mentioned and enumerated in the following schedule or abstract; and the builders are to provide and be at the expense of all materials, labour, plant, implements, tools, cartage, water, and other matter and things of every description necessary for the due and proper execution of the works in accordance with the drawings, general conditions, and this specification.

[Here follows the specification of the work. (1)]

XI. D.
Bill of
Quantities.

XI. D.

THE THIRD SCHEDULE.

BILL OF QUANTITIES (m) of the several works required to be executed in the construction and erection of _____, and other works shown upon the drawings, described in the specification, or given in this bill of quantities.

Date _____

Architect _____

NOTE.—No explanation or memorandum in the following quantities is intended, or is to be considered, to override or alter the terms of the specification, or the character or nature of the work as shown upon the drawings.

For the manner of executing the works the builders are referred to the specification and general conditions and to the plans, sections, and details set forth on the sheets referred to in the specification, and as may be further ordered from time to time by the architect.

[Here follow other notes as to measurements, etc., and the prices.]

XII.
Arbitration
Clause.

XII.

Form of arbitration clause.

1. If any dispute or difference shall arise or happen between the sd parties touching or concerning the said bldgs and works or any of them hereby agred to be built, done, and executed as afo, or touching or concerning any other matter or thing whatever relating to the work hereby contracted to be done, or in respect of any such additional or extra work, deductions, deviations, or alterations made in, to, or from the sd works, or any part of them as afo, or touching or concerning the meaning or intention of the specifications, or of this agrmt, or of any part thereof, or of any plans, drawings, instructions, or directions referred to in the

(1) The specification, bill of quantities, and drawings will have a similar memorandum upon them.

(m) As to the danger of making the bill of quantities part of the contract, see *ante*, p. 8. See previous note.

XIII.

Sub-contract.

Agreement
to pay con-
tract price.

No extras
without order
in writing.

Penalty for
delay.

amount (if any) which shall be payable to the sd [sub-contractor] by virtue of this agrmt; and in the event of that amount being insufficient the sd [sub-contractor] will pay to the sd [contractor] any deficiency, and all costs and expenses attending the recovery of the same by action or otherwise.

4. THE sd [contractor] will in conso of this agrmt pay to the sd [sub-contractor] the sum of £ when the architect or surveyor for the time being of the sd [corporation] shall have certified in writing that the sd work has been finished and completed to his satisfaction [or insert here terms if by instalments]. (r)

5. No extra work shall be charged to or paid for by the sd [contractor], except such extra work as may be ordered by the sd [contractor] in writing, but such order shall not operate so as to extend the time beyond the day of to be allowed as aforesaid for the completion of the work [or insert here time to be allowed, at the rate of, etc.].

6. THE sd [sub-contractor] shall pay to the sd [contractor] the sum of £ , as liquidated damages, and not by way of penalty, per day for each day after the day of that the sd work shall not be finished or complete, until completion as aforesaid, and it shall be lawful for the sd [contractor] to retain the sd sums out of any moneys payable to the sd [sub-contractor].

AS WITNESS, ETC.

XIV.

XIV.

Sub-contract
by letter.

SUB-CONTRACT by letter containing references to head contract. (s)

WE, the undersigned [here insert name and address of sub-contractors] hereby agree and undertake to carry out all mosaic and other work at for [name and address of contractors] and to the entire satisfaction of the architect [name and address of architect], orders for which have been or will be sent us from time to time by the said [contractors] the work to be carried out as and when required by them; we further agree that no claim shall be made by us for any extras of any kind, unless the same have been ordered in writing by the said [contractors] and that we shall maintain in proper working order the whole of the work executed by us until the expiration of the time for which the said [contractors] are bound by their employers under contract dated the day of , 19 , and we will also indemnify them against any loss upon any question which may arise under Clause (t) of the conditions of the contract above mentioned, and the terms of payment for the work in question shall be exactly the same as those set forth in Clause (u) of the said conditions of contract above referred to; and in fact we are willing and hereby agree to be bound in every respect by the whole of the terms, clauses, and conditions as set forth in the contract dated , 19 .

XV.

XV.

Bond from
Builder and
Surety.

BOND from a builder and a surety in the form of a joint and several bond. (v)

KNOW ALL MEN by these presents, that we, A. B., of, etc. [builder], and C. D., of, etc. [surety], are held and firmly bound to E. F., of, etc., in the penal sum of

(r) As to the rights of a sub-contractor on the bankruptcy of the builder, see *ante*, p. 168.

(s) A form of this kind was used and was considered in *Geary Walker & Co. v. Lawrence*, Appendix, p. 678. In view of the difficulties which arose in that case, the adoption of this method of contracting is not recommended.

(t) This reference is to F. VIII., Cl. 20, *ante*, p. 386.

(u) The reference here was to a clause based on F. VIII., Cl. 30, p. 389, *supra*.

(r) See generally as to sureties, Chap. IV., Sect. II., *ante*, p. 25. For a bond by a contractor and his sureties to a corporation, see L. T. *News*, Vol. 107, p. 545.

I, _____, do hereby give notice and require you forthwith to proceed diligently, and in a proper and workmanlike manner, with the erection and completion, in accordance with the terms of the contract entered into by you with me, dated, etc., of the [insert description of buildings] situate, etc.; AND THAT in case you shall neglect or refuse to proceed with the erection and completion thereof as aforesaid for _____ days after the service of this notice, I shall then enter into and upon the said premises, and employ such other contractor and workmen, and supply such materials as may be necessary to complete and finish the said _____ at your risk and expense, or sell the same either finished or unfinished, as I may be advised; AND THAT I shall take all such proceedings as may be necessary for the purpose of completing the works in accordance with the said contract, and obtaining payment of all such moneys as shall be or become due to me pursuant to the said contract without any further notice.

Dated the _____ day of _____, _____.

Signature _____.

XV.
Bond from
Builder and
Surety.

Recital of
building
contract.
Surety.
Condition.

XVI.

NOTICE to builder to proceed with work. (2)

XVI.
Notice to
Builder to
proceed.

To A. B., of, etc. [builder].

I HEREBY give you notice and require you forthwith to proceed diligently, and in a proper and workmanlike manner, with the erection and completion, in accordance with the terms of the contract entered into by you with me, dated, etc., of the [insert description of buildings] situate, etc.; AND THAT in case you shall neglect or refuse to proceed with the erection and completion thereof as aforesaid for _____ days after the service of this notice, I shall then enter into and upon the said premises, and employ such other contractor and workmen, and supply such materials as may be necessary to complete and finish the said _____ at your risk and expense, or sell the same either finished or unfinished, as I may be advised; AND THAT I shall take all such proceedings as may be necessary for the purpose of completing the works in accordance with the said contract, and obtaining payment of all such moneys as shall be or become due to me pursuant to the said contract without any further notice.

Dated the _____ day of _____, _____.

Signature _____.

XVII.

NOTICE to builder of termination of contract. (3)

XVII.
Notice to
Builder of
termination
of Contract

WHEREAS by an agrmt, etc. [recite agreement]; AND WHEREAS the architect mentioned in the said specification is dissatisfied with the nature and mode of proceeding with, and at the rate of progress of, the works, and the contractors have failed to proceed in the execution of the works in the manner and at the rate of progress required by the said architect; NOW THE SAID [employer] DOETH HEREBY GIVE THE SAID _____ the said contractors and each of you NOTICE that he will at the expiration

(1) As to the form of the words see *Kings v. Mather*, 11 Q. B. 191, and *ante*, p. 27.

(2) The next precedent is a more formal notice. See Chap. XI, Sect. III. (a), *ante*, p. 164, for another form of notice, which was held to be sufficient. See *F. VI, Cl. 12*, p. 378, for a form of clause under which this notice may be given.

(3) See this form in *Walker v. L. & N. W. Ry. Co.*, 12 H. L. C. P. D. 428.

XVII.**Notice to
Builder of
termination
of Contract.**

of one week from the date hereof, take the sd works entirely out of your hands, and will, if need be, employ other contractor or contractors, workman or workmen, to proceed with the sd works and complete the same, and also that the sd architect on their behalf will procure and make use of such labour and materials as he may deem necessary, deducting the cost thereof, as in the agrmt provided. And the sd employer gives you further notice that the sd contract shall be considered void as far as relates to the works or maintenance remaining to be done, and that the sums of moy, materials, implements, and penalties herebefore mentd shall be and hereby are forfeited to the sd employer. [*Add, if necessary, as to expenses incurred in taking possession of works.*]

To .

Signature .

Dated .

SECTION II.

AGREEMENTS FOR BUILDING LEASES.

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XVIII.

XVIII.

AGREEMENT FOR BUILDING LEASE for 99 years of one house to be granted after building finished. (a)

Agreement for Building Lease for 99 years.

AN AGREEMENT made the day of BETWEEN [parties]. Whereby it is agreed as follows:

Parties.

1. THE tenant shall, until the expiration of calendar months from the date hereof, have the right to enter upon ALL THAT plot of land [description] which with the abutments delineated on the plan hereto annexed for the purpose of extending the works mentioned in Clause 2 hereof. Right of entry for purpose of building.

2. THE tenant will, within the said period of calendar months, at his own cost in all respects in a substantial and workmanlike manner and with materials of the best description of their several kinds conformable to the statutory and local regulations applicable thereto, and in accordance with plans, elevations, and sections to be approved by the landlord's surveyor for the time being, and according to the building line marked on the said plan hereto annexed, build and finish fit for immediate comfortable occupation on the said plot of land one dwelling-house and no more, with proper offices, outbuildings, walls, fences, drains, erections, and other conveniences and appurtenances, and in particular will build a good and substantial brick wall, 9 ins. thick and 4 ft. 6 ins. high, with a suitable coping along the whole of the side of the said plot of Tenant to build dwelling-house within specified or extended time, and with suitable materials.

(a) This form is taken from the *Encyclopedia of Forms*, Vol. VII., p. 27, by permission of the publishers.

(b) As to this clause, see p. 423, ante.

(c) For clauses providing for extension of time in certain cases, see p. XXI., Cls. 13, 14, p. 421.

XVIII.

—
**Agreement
 for Building
 Lease for
 99 years.**

ground, in a line and uniform with the wall on the side of the adjoining plot of ground, expending on the before-mentioned works in cost of labour and materials the sum of £ at the least, and producing vouchers of such expenditure to the landlord if required. Provided always that if the tenant shall be prevented from finishing the said dwelling-house and works through labour disputes, he shall be allowed such a reasonable extension of time for completion of the works as the surveyor for the time being of the landlord shall certify. Provided also that all materials or work condemned by the said surveyor shall be removed and replaced by others approved by him.

Tenant to insure when house roofed in.

3. So soon as the said dwelling-house shall be roofed in, the tenant shall insure the same in the joint names of the landlord and tenant in an office approved by the landlord, in the sum of £ . (d)

Tenant to pay proportion of repair of road.

4. THE tenant shall pay to the landlord a proportional part (to be ascertained and fixed by the landlord's surveyor) of the expense of keeping in repair the roadway and footpath in front of the house agreed to be built until the same shall be taken over by the local highway authority.

Power for landlord to enter and view works.

5. THE landlord, his agent, and surveyor shall have the right at all reasonable times to enter upon the said premises to view the state and progress of the said works, to inspect and test the materials and workmanship, and for any other reasonable purpose, including the constructing, repairing, or cleansing of any sewer or drain from any adjoining land of the landlord.

Right of re-entry on default in completion.

6. IN case the tenant shall fail to complete the said dwelling-house and works within the time aforesaid and in accordance with his stipulations hereinbefore contained, or shall not proceed with the works with due diligence, the landlord shall be at liberty to re-enter upon and resume possession of the said land, and thereupon this agreement shall cease and become void.

Tenant to pay district surveyors and other charges.

7. THE tenant shall pay the fees of the surveyor of the local authority, and all other fees, charges, and expenses which during the progress of the works or afterwards may become payable by statute, the bye-laws of the local authority, or otherwise.

Lease to be granted on completion of works.

8. IF the said message and works shall be finished by the tenant in accordance with the stipulations hereinbefore contained, the landlord will grant and the tenant (without any investigation of title or any abstract or evidence thereof (e)) will accept and execute a counterpart of the lease of the said plot of land and the dwelling-house erected thereon for the term of 99 years from the day of , at the yearly rent of a peppercorn, if demanded for the first year of the said term, and the net yearly rent of £ during the residue of the term, payable [half-yearly] on the [state days of payment], the first half-yearly payment of such yearly rent of £ to be made on the day of . The lease shall be in the form set forth in the schedule hereto, with such modifications as the parties may agree upon or circumstances may render necessary. (f)

Tenant to pay costs.

9. THE tenant will pay the costs and expenses of and incidental to the said lease and counterpart and £ for the costs of this agreement in duplicate.

Tenant not to assign agreement.

10. THE tenant shall not [except by way of mortgage] assign or part with his interest under or the benefit of this agreement or of any part thereof without the previous consent in writing of the landlord, and in case of any permitted assignment the tenant shall continue liable for the performance of the several stipulations herein contained until the grant of the lease hereinbefore mentioned.

(d) See another clause, F. XXI., Cl. 15, p. 419.

(e) See F. XXI., Cl. 2, p. 417.

(f) See F. XXVII., *et seq.*, p. 429.

11. UNTIL the execution of such lease as aforesaid the tenant shall be deemed to be a tenant at will of the premises at the same rent and subject to the same obligations as if the lease had been actually executed.

AS WITNESS, ETC.

[Signatures of both parties.]

THE SCHEDULE ABOVE REFERRED TO.

[Form of lease.](g)

XVIII.

Agreement for Building Lease for 99 years.

Tenancy at will until lease executed.

XIX.

XIX.

AGREEMENT to grant several building leases to tenant or nominee.(h) The houses to be entirely finished on certain plots before leases of other plots are granted. Separate leases to be granted when houses covered in. Certain sum to be laid out on each house. Covenants to be contained in leases. Tenant to make a road and pay proportion of roads, etc., to be used in common with other occupiers. Power to landlord to determine agreement and to take possession of buildings, materials, etc. Covenants by lessor to build only in a specified manner and to take covenants from other tenants to pay proportion of repair of roads, etc., etc.

Agreement for several Building Leases to Tenant or Nominee.

AN AGREEMENT made the day of , 18 , BETWEEN A. B. of, etc. (hereinafter called "the landlord"), of the one part, and C. D., of, etc., (hereinafter called "the tenant"), of the other part.

1. DURING from the date hereof the tenant, for the purposes only of holding and executing the houses and works in the manner and to the extent hereinafter stipulated, may enter upon the plots or pieces of land situate at , fronting on the [description, etc.], which are delineated and described in the plan hereto annexed and thereon coloured , and numbered respectively (hereinafter called "the premises comprised in this agreement").

Power of entry to tenant to build.

2. THE tenant will, within years from the date hereof, (i) at his own expense, erect, cover in, and finish fit for occupation on the premises comprised in this agreement 20 pairs of semi-detached houses and 20 detached villa residences, with suitable offices, outbuildings, and with proper vaults, areas, gardens, sewers, drains, walls, fences, and all footpaths, curbs, and pavings, and will build on the plots numbered 1 to 20 inclusive on the said plan the said 20 pairs of semi-detached houses on or before the day of , and will build on the plots numbered 21 to 30 inclusive on the said plan the said 20 detached villa residences on or before the day of .

Time for building.

3. THE tenant will erect, cover in, and complete fit for habitation and use, the said semi-detached and detached houses, with offices, outbuildings, vaults, areas, gardens, sewers and drains, walls, fences, footpaths, curbs and pavings, upon the said plots or pieces of land, in a good, substantial, and workman-like manner, with fit and proper materials, and in all respects in conformity with the specifications hereunder written, and to the satisfaction of the architect or surveyor for the time being of the landlord, and under his direction and inspection, and according to

To execute work under inspection of landlord's surveyor in accordance with specifications and plans, etc.

(g) See F. XXVII., et seq., p. 129.

(h) An agreement for a lease, and even an option to require a lease or a renewal of a lease, is an agreement in equity, and is enforceable in equity, and is enforceable, or enforceable, per Lord Macnaghten in *Tulk v. A. D. & C. Ltd.* and *Macnaghten v. A. D. & C. Ltd.* (1903), A. C. 411, at p. 423. For a form of agreement of an agreement for a building lease, see *Encyclopædia of Forms*, Vol. III., p. 347. See also *Agreement for a Building Lease*, 1st ed., Vol. I., p. 12.

(i) *Agreement for a Building Lease*, 1st ed., p. 12.

XIX.**Agreement
for several
Building
Leases to
Tenant or
Nominee.**

Tenant to lay
out a certain
sum upon
each house.

Tenant to use
land only for
purpose of
agreement,
and not to
burn bricks,
etc.

Not to dig up
or remove
clay, etc.

Landlord to
grant leases
of plots 1 to
20 on certain
conditions to
tenant or
approved-of
nominee;

—tenant not
to assign, and
nominee not
to be accepted,
without pre-
vious approval
in writing of
the landlord.

plans, sections, elevations, and detail-drawings throf, which have been signed by the parties hrtto, and a copy whrof has been deposited with the architect or surveyor of the landlord.

4. UPON each of the sd semi-detached houses so to be erected as afsd, the tenant will lay out and expend the sum of £ at least, and upon each of the sd detached houses so to be erected the sum of £ at least, and will at the request of the landlord produce full and satisfactory vouchers of expenditure to the value afsd.

5. THE tenant shall not during the continuance of this agrmt carry on, or permit to be carried on, or committed, on any part of the premes comprised in this agrmt, or in any blding or erection thron (whether afixed to the land or not), the business of brickmaking [or the making or burning of bricks for any purpose (k)], or any trade, business, manufacture, or occupation whatsoever, or any nuisance; nor use or allow the premes comprised in this agrmt or the bldings thron to be used for purposes of public amusement, or for any other purpose whatsoever than strictly for the purpose of this agrmt, and as private dwg-hses.

6. No part of the several plots or parcels of ground shall be dug out deeper than required for the several bldings and drains, and the road to be made as hrnar mentd, and no earth, clay, sand, loam, or gravel dug out shall be sold or disposed of, nor shall any be removed from the premes except such as it is necessary to remove for the perfee of the works [and no bricks shall be made or burnt upon the sd premes. (l)]

7. [Tenant to iasure house as soon as covered in. Insert Cl. 18 of F. XX., p. 415.]

8. THE laudlord will from time to time, at the expense of the tenant as hrnar mentd, when and as often as any of the houses to be built upon the pieces or plots of land numbered 1 to 20 inclusive on the sd plan shall have been erected and covered in, and the drains and sewers thrfrom shall have been formed, (m) to the satisfaction of the architect or surveyor for the time being of the landlord, and in all respects according to this agrmt, grant or cause to be granted to the tenant or his nominee to be approved by the landlord, a lease of such house or houses, and of the site throf, and of the intended yards, gardens, and outbuildings thrtto belonging, such lease to be for the term of 99 years from the (unless sooner determined by surrender, re-entry, forfeiture, or otherwise), and to contain the several exceptions, reserouns, covts, condons, and provisions hrnar specified.

9. (n) THE tenant shall not in any way assign or part with the benefit of this agrmt, (o) and the landlord shall not be required to grant a lease to any pson or psons other than the tenant, unless and until the landlord shall previously approve in writing of such pson or psons, or nominee, or shall grant to the tenant a licence in writing to assign any plot or portion of the premes comprised in this agrmt, Nor shall any nominee, or assnee, of the tenant be entitled to take any

(k) Insert these words if no bricks to be used in the building operations under the agreement are to be burnt.

(l) Sometimes the first part of Cl. 5 is omitted and these words added to Cl. 6.

(m) Insert here any provisions making the completion of roads a condition precedent.

(n) In the case of a large building scheme, arrangements are usually made for assignments or underleases by the builder.

(o) If the agreement does not prohibit assignment, an assignee of the entire agreement is entitled to a lease of one plot as soon as the works are executed, without assuming the liability of the tenant in respect of other plots: *Wilkinson v. Clements*, 8 Ch. App. 96, noted *ante*, p. 217.

land or other proceedings to compel the landlord to grant a lease of the sd premises comprised in this agmt, or any portion thereof, to such nominee, or nominee, except in pursue of the sd condons precedent, and of the provns and condons of this agmt.

XIX.

Agreement for several Building Leases to Tenant or Nominee.

10. The clear annual rent to be reserved in and by the sd lease in respect of the sd plots or parcels of land numbered 1 to 20 inclusive on the sd plan as afd, shall be £ for each such plot resp'y, and in respect of the sd plots of land numbered 21 to 30 inclusive on the sd plan as afd, shall be £ for each and every such plot of land resp'y, such rents resp'y to be payable as herein provided.

Rent.

11. p) The tenant will, when and so often as any house or houses so to be built upon the pieces or plots of land numbered 1 to 20 inclusive on the sd plan shall be erected, built, and covered in as afd (of which no lease shall have been granted), apply for, and accept, a lease or leases to him or his nominee to be approved as afd, of such house or houses, with the appurts as afd, without in any way investigating or requiring the title thereto, (q) and shall duly execute a counterpart or counterparts of such lease or leases; and every such lease and counterpart as afd shall be drawn and engrossed by the solicitor of the landlord, and the tenant shall pay to such solicitor for the preparation of every such lease and counterpart, and for all costs incidental thereto, the sum of guineas for a lease of one house, and also guineas for any additional house comprised in the same lease, and the tenant shall bear and pay the expenses of preparing, stamping, and obtaining the exon of these presents in duplicate.

Tenant to apply for and accept leases. Not to investigate title; —to execute counterpart. Leases and counterparts, and also this agreement, to be prepared by landlord's solicitor at tenant's expense.

12. The landlord will from time to time, at the expense of the tenant as hereinbefore, when all the sd houses to be erected upon the sd plots of land numbered 1 to 20 inclusive on the sd plan shall have been completely finished in all respects to the satisfaction of the architect or surveyor of the landlord for the time being, and according to the agmt afd, and the lease or leases thereof shall have been granted in pursuance of the condons hereinbefore contd; and in addition thereto when and as often as any of the houses to be built upon the pieces or plots of land numbered 21 to 30 inclusive on the sd plan shall have been erected and covered in and the drains and sewers thereon shall have been formed to the satisfaction of the architect or surveyor for the time being of the landlord, and in all respects according to this agmt, grant or cause to be granted to the tenant or his nominee approved as afd, a lease of such last-mentioned house or houses and of the site thereof, and of the intended yards, gardens, and outbuildings thereto belonging, such lease to be for the term of 99 years from (unless sooner determined by surrender, re-entry, forfeiture, or otherwise), and to contain the several exceptions, reservations, covenants, conditions and provisions herein specified; and when and so often as afd the tenant will apply for and accept a lease or leases to him or his nominee approved as afd of such house or houses without investigating or requiring the title thereto, (r) and the tenant or such nominee shall duly execute a counterpart or counterparts; and every such lease and counterpart shall be drawn and engrossed by the solicitor of the landlord and at the tenant's expense in accordance with the provisions mentioned in the preceding paragraph.

Landlord will grant leases of plots 21 to 30 after leases have been granted of plots 1 to 20, and the houses on plots 21 to 30 have been completely finished, etc.

Tenant will apply for and accept such leases.

13. The tenant shall pay all fees and other moneys which may become payable to any district or public surveyor in respect of the premises comprised

Tenant will pay district surveyor's and landlord's surveyor's fees.

(p) If the houses are small, an arrangement should be made to include several in one lease. As to investigating the title, see pp. 62, 289.

(q) Even where there is no stipulation of this kind, an intended lease (exclusive of a sub-lease, see *Convey. Act*, 1881, s. 1) is not entitled to call for the lessor's title, *V. & P. Act*, 1874, s. 2 (1). It is often considered prudent however, where there is much at stake, to insert a covenant expressly providing that the tenant shall have the right to call for the lessor's title. See p. 62 *note*. For a form of such a clause, see *F. XXI*, Cl. 2, p. 417.

(r) *But see note*, pp. 62, 289, as to investigating the title for building.

XIX.**Agreement for several Building Leases to Tenant or Nominee.**

Landlord may enter to view work;
and graze cattle, etc.

Every lease shall contain:
Reservations and exceptions, etc.

Covenant to pay rent;

—to make a road;

—to pay proportion of expenses of repairing new roadway, and of making and repairing roads, etc., to be used in common with other tenants;

Covenants by landlord for quiet enjoyment.

in this agrmt, and shall pay to the architect or surveyor of the landlord for the time being the usual and proper fees of a surveyor for supplying the drawings, superintending the several works, and giving certificates of the completion thereof.

14. THE landlord and his architect or surveyor for the time being may, at all reasonable times, enter upon the premises comprised in this agrmt, or any part thereof, to view and survey the works hereby agreed to be executed and the materials to be therein used. The landlord and his agents shall also during the continuance of this agrmt be permitted to enter upon the premises comprised herein, and to use the same for the purpose of grazing cattle and for any other purpose, provided that none of the rights of the tenant under or by virtue of this agrmt be prejudiced thereby.

15. EVERY lease that shall be granted in pursuance of this agrmt shall contain such exceptions and reservations of the running of water and soil, and of all right (if any) restricting the free use of any contiguous or adjoining land of the landlord, or the appropriation at any time hereof of such land, for building or other purposes [see note (t), p. 409], as are usually inserted in the leases of the landlord;

AND every such lease shall contain covenants on the part of the tenant, or his nominee approved as aforesaid, for payment of such apportioned rents as are herebefore mentioned by half-yearly payments on the day of and the day of , the first payment to be made on such of those days as shall first happen after the granting of the lease, and the last to be made in advance one calendar month before the expiration of the term, and [for covenant to complete building, etc., see F. XX., Cl. 15, p. 414]. AND to make and lay down on the side of the plots numbered 1 to 20 inclusive on the said plan a new roadway feet in width, with a footpath feet in width, to the satisfaction of the architect or surveyor of the landlord for the time being; such road and pathway to be properly made and laid down with chalk or bawns and gravel, the road to slope nine inches from the crown to the water-tables, and the pathway to slope two inches towards the water-tables;

AND to pay a fair and just proportion (such proportion to be settled by the architect or surveyor of the landlord for the time being) of all expenses and charges for repairing the said new roadway and pathway, and for making, renewing, and repairing all other roads or pathways, pavements, channels, sewers, drains, watercourses, and party walls or fences which are or shall be used in common by occupiers of the premises comprised in this agrmt and the occupiers of any dwellings and buildings erected or thereon to be erected on any part of the estate of the landlord adjoining or contiguous thereto, until the said roads, pathways, sewers, and drains, shall be legally repairable as public roads, highways, sewers, and drains, in which case the tenant or his nominee will be liable under the covenant to pay taxes, outgoings, and rates so to be contained in such lease as aforesaid: Such proportion shall be fixed by the surveyor of the landlord for the time being. [Here insert such of the following covenants as may be thought necessary:—(1) To repair (Cl. 11, F. XX., p. 414); (2) To paint outside (F. XXVII., p. 431); (3) To paint inside (*ib.*); (4) To permit landlord to enter to view repairs (*ib.*, p. 432); (5) To permit workmen to repair adjoining premises (*ib.*); (6) To insure (*ib.*, p. 431, and see p. 436); (7) To allow landlord to insure in case of default (F. XXVII., p. 432); (8) To lay out insurance monies and make up deficiency (*ib.*); (9) To give notice of assignments (p. 437); (10) Not to permit trades (p. 432); (11) To use as private dwelling-house (*ib.*); (12) Proviso for re-entry (p. 432)]. (s)

AND shall contain the usual qualified covenant by the landlord for quiet

(s) See other covenants in F. XXVIII., p. 433; F. XXIX., p. 438; F. XXX., p. 441.

enjoyment, (t) And every such lease shall also contain all other covenants and conditions (if any) usually inserted in leases of a like nature. (u)

XIX.

Agreement for several Building Leases to Tenant or Nominee.

Tenant to pay certain rents until leases granted.

16. The tenant will, in the meantime and until a lease or leases shall have been granted in pursuance of the agrmt in that behalf herebefore contd, the said several plots of land, pay unto the landlord the (w) several yearly rents following, that is to say, for the first year from the day of a peppercorn, for the second year from the same day the sum of £ , and for the third and every subsequent year from the same day the sum of £ , each of such yearly rents to be paid by two equal half-yearly payments on the day of and the day of in every year, and the first of such half-yearly payments to be made on the day of , but so nevertheless that from the yearly rents for the time being payable under this present agrmt there shall always be deducted the yearly rent or rents (if any) which shall for the time being have been reserved and become payable under any lease or leases which shall then have been granted in pursuance of the agrmt in that behalf herebefore contd, and so that, if the total sum of the rents which shall at any time have been reserved and become payable upon any such lease or leases shall be equal to or exceed the rent for the time being payable in pursuance of this agrmt, such last-mentioned rent shall wholly cease.

17. In the meantime and until such lease or leases as aforesaid shall be granted the tenant shall occupy the said plots of land subject to the agrmt herein contd, and also, so far as applicable, to the covenants and conditions hereby provided to be contained in such lease or leases, in the same manner as if such lease or leases were actually granted and the tenant had executed a counterpart or counterparts thereof. (x)

Until leases granted, tenant to occupy, subject to covenants in lease.

18. The tenant or his nominee shall not remove or permit to be removed (until after the completion of the said houses and other works in accordance with the provisions and stipulations herein contd), without the consent in writing of the

Tenant not to remove material, etc.

(t) In order to prevent deterioration in the value of the premises demised, where they form part of an estate upon which dwelling-houses of a certain class only should be built, the lease might contain from the lessor the following covenants:

"And every such lease shall also contain covenants by the landlord not to erect or suffer to be erected during the said term on any part of the estate of the landlord adjoining the premises comprised in this agrmt, and not hereby demised, within

Covenant by lessor to erect only houses of certain class;

It from the premises hereby demised or any part thereof, any building whatsoever other than a private dwelling-house or private dwellings, in the erection of each of which not less than £ shall be expended: And that until the said roads and drains on the said plan shall be legally repairable as public roads or highways, the landlord will on every letting on lease or otherwise of any part of the estate of the landlord adjoining hereto and not hereby demised take from the lessee a covenant or covenants that such lessee, his executors, administrators and assigns will, during so much of the term to be granted to him as the said roads or ways shall not be so legally repairable as aforesaid, lease and pay a fair proportion, to be ascertained and apportioned by two arbitrators or surveyors for the time being of the landlord, of the expense of keeping or repairing such roads or ways and the foregoing thereof."

—and to take a covenant from all other lessees to pay proportion towards repair of roads.

(u) As to usual covenants, see ante, p. 35.

(w) Where the lease itself reserves the same rents as are to be payable under the agreement, another form applicable is—

"The yearly rent or rents for such or some of premises herebefore stipulated to be reserved and made payable in the lease or leases to be granted thereof aforesaid in such proportions and in such manner as the same will be due and payable in case a lease or leases thereof had been actually granted."

(x) See *Widdowson v. Lister*, 21 Ch. D. 9 note, p. 54; *Lewis v. Parker* (1890), 1 Ch. 42; *Lilly v. H. and W. K. (1891)*, 17 Q. B. 202; *Quilley v. Chappin* (1890), 1 Ch. 600. But see (l), 25, note.

XIX.

Agreement
for several
Building
Leases to
Tenant or
Nominees.

landlord or his architect or surveyor for the time being, any of the blding materials (y) or other things which shall be brought or deposited upon the sd plots of land or any portion throf, or upon any street, road, or passage adjoining thereto, for the purpose of erecting and completing the sd houses and other works; and any blding materials and all other things which may have been brought upon the sd plots of land, or upon any street, road, or passage adjoining thrtto, shall become the ppty of the landlord and (z) be considered as immedly attached to the bldngs to be erected, or in course of erection, upon the sd plots of land on which such blding materials or other things may be deposited, or (as to such blding materials or other things which may, for the time being, be deposited upon any such street, road, or passage as afsd) to the bldings for the erection or completion of which the same may have been provided.

Power of entry
if rent not
paid or in case
of bankruptcy
or after notice
if houses not
completed as
agreed or on
breach of any
of the tenant's
agreements,
etc.

19. IF the sd houses, offices, outbuildings, and other works shall not be erected and covered in and completed within such times as afsd, (a) or if any part of the yearly rents which under or by virtue of this agrmt shall for the time being be payable by the tenant until a lease or leases shall have been granted in pursce throf of the sd parcels of land shall be in arrear for 21 days, whether legally demanded or not; or if there shall be a breach of any of the tenant's agrmts hrin contd, or if the tenant shall become bankrupt, or compound with or make an assmnt for the benefit of his creditors, then and in any of such cases it shall be lawful for the landlord [after giving or leaving notice in writing, to the tenant, or at his last known address, requiring the work to be proceeded with or pointing out the specific default of the tenant] [or immedly] to enter upon and take possession of the premises comprised in this agrmt, or so much thereof as shall then remain to be demised, and also to remove the tenant from further interference with the erection of all or any of the said houses, bldings, and other works, and it shall also under such circumstances be lawful for the landlord to employ any other person or persons to carry on and complete the same, and if he shall think fit to authorise him or them to use (b) the plant, materials, and ppty upon the works for and towards the completion of the said dwg-hse or dwg-hses and bldings, or other works; and the value of such plant, materials, and ppty shall be estimated by the architect or surveyor of the landlord for the time being, and the costs and expenses incurred in any way in carrying on and completing the sd dwg-hse or dwg-hses and bldings or other works as afsd shall be the first charge thron, and the same or any part throf may be sold by the landlord to pay such charge, by public auction or private contract, and without reference to any outlay by the tenant thron, and the sd materials or other things,

Power of land-
lord to use
materials and
plant, and to
prevent tenant
from further
proceeding
with building.

(y) Having regard to Cl. 3, *supra*, which provides that fit and proper materials "to the satisfaction of the architect," shall be used, it may sometimes be convenient to insert the following words at this point: "Other than defective or improper materials removed for the purpose of being replaced by proper materials."

(z) See *ante*, p. 170, *et seq.*, as to such conditions.

(a) If the delay is due to the omission of the landlord's surveyor to furnish or to approve plans, the landlord cannot avail himself of this clause: *Roberts v. Bury Commissioners*, L. R. 5 C. P. 310. See this case and others cited *ante*, p. 114.

(b) This clause as to the user only of the materials is not advisable, as difficulties may occur with respect to the construction of Cl. 18, in such cases as are referred to at p. 178. The following is another more stringent form to be inserted after the power to the landlord to enter and take possession of the land. See also other forms with more stringent conditions, F. XX., Cl. 22, p. 415; F. XXIV., Cl. 15, p. 425.

"and hold and enjoy the sd premes and the dwg-hse and dwg-hses and all bldings standing thron, and all plant, materials, and ppty of the tenant then upon the sd premes or any part throf, as and for a stipulated compensation for the damage occasioned by the breach or failure of the tenant to perform this agrmt and not as in the nature of a penalty or forfeiture, and neither the tenant nor any person claiming under him shall afterwards be entitled to any right or interest whatsoever under this agrmt or otherwise in respect of any such land or of the bldings or plant and materials then being thron."

or the produce thereof, if the landlord should elect to sell as aforesaid, may be retained by the landlord against any money due, or to become due, from the tenant in consequence of the breach of this agreement or the non-completion of any of the said duties. The landlord may execute all such instruments as may be necessary for carrying into effect any such sale; and upon any sale purporting to be made under this clause, the purchaser shall not be bound or concerned to see or inquire whether either of the above-mentioned herein as authorizing a sale has happened. [But no such notice as aforesaid shall be necessary previous to an entry by the landlord in case of the bankruptcy or insolvency of the tenant or of a breach of the agreement to insure or of the condition against assigning habite condit]. (c)

20. [Insert, if necessary, clause as to avoidance not affecting other parcels, P. XX., Cl. 22, *ad. inf.*, p. 415.]

21. [Insert Cl. 23, P. XX., p. 416, as to leases not being granted while rent is in arrear, or any buildings contrary to conditions are on premises.]

22. If any difference shall arise respecting the rights or obligations of either party under these presents, the same shall be referred to two arbitrators or their umpire pursuant to, and to as with regard to the mode and consequences of the reference and in all other respects to conform to, the Arbitration Act, 1889. [Arbitration clause.]

23. These presents are intended to operate as an agreement only, and not as an actual demise of the premises comprised in this agreement or the licence to be created there, and shall not give the tenant any legal title in any part of the premises comprised in this agreement until the lease of such part shall be executed, except so far as to create a strict liability at will on the part of the tenant upon the terms aforesaid, and to entitle the landlord to the like power and remedy by distress or otherwise for the recovery of the rent or respective rents to become due under these presents as if the lease or leases had been actually granted. [Agreement not to operate as actual demise, but as to any at will.]

24. The words "the landlord" used in these presents shall extend to and include the heirs and assigns of the said A. B., and the words "the tenant" shall extend to and include the executors, administrators, and assigns approved of as herein stipulated by the said C. D. in like manner as if they had been respectively herein next after the words "landlord" and "tenant" respectively throughout, so far as the same will admit and under the context or the nature of the case may require a different construction. [Operation of the words "landlord" and "tenant"]

As WITNES, &c.

SCHEDULE.

[Containing the specification, &c.]

XX.

AGREEMENT for the grant of building leases on completion of buildings on an estate comprised in the said Act. Conditions if within the limits of the London Building Act. Provisions for separate lease if required. Appointment of rent. Power to make roads, sewers, drains, &c. Specifications and form of lease is added, &c. (c)

XX.

Agreement for Building Leases with Conditions if within the Metropolis. (Contd. from p. 406.)

Part III.

Power of entry to build.

1. AN AGREEMENT, &c. [printed as in P. XIX., p. 405.]

2. [Power of entry to build. Insert Cl. 1 of P. XIX., p. 405.] (f)

(c) If the tenant wishes to put a tenant at will, he should insert a clause similar to Cl. 18 of P. XXI., p. 424.

(d) If land is to be sold in fee, but if parcel of a farm only then "the executor, administrator, and assigns."

(e) But see as to cost, where the lease is a mortgage to the agreement, *Re Humber and Son's*, 52 L. T. 82, and where the lease is on a general printed form, *Re City & South*, [1890] 1 F. 221.

(f) Power should here be given if necessary to pull down the old buildings, and to sell

XX.

Agreement
for Building
Leases with
Conditions
if within the
Metropolis.
(Another
form.)

Landlord to
grant lease
on buildings
being covered
in.

Parcels.

Rent;

3. THE landlord shall, on the request and at the costs and charges of the tenants, when and so soon as the messes, erections, and bldings hrnar agreed to be built shall be built and covered in (g) to the satisfaction of the landlord or his architect or surveyor for the time being as hrnar provided, and when and so soon as the roads and main sewers and drains and other works, hrnar made obligatory on the tenants to form and make, shall have been formed and made as hrin provided, (h) by indre of lease, or, at the option of the tenants, by several indres of lease, (i) demise unto the tenants or unto such other person or persons as they shall direct or appoint, (k) ALL the premises comprised in this agreement: TOGETHER with all messes, erections, and bldings, to be erected and built on the same piece of ground, or any part throf: And all ways, easements, and appurts to the same belonging; (Except and reserved out of the sd demise or demises hrly agrd to be made, the free passage of water and soil, in, by, and through the channels and drains belonging to, or which shall be in, upon, or belonging to, the sd premes agrd to be demised) TO HOLD the sd piece of ground, etc., and the sd bldings, etc., as afsd unto the tenants for the term of 99 years from the day of : AT THE RENT of a peppercorn for the year [or years] of the sd term, if the same shall be lawfully demanded, and at the clear yearly rent of £ for the residue of the sd term, payable by equal quarterly payments on the usual quarter days, free and clear of any future land tax (the late land tax on the said premises having been purchased or redeemed by the landlord), and also free and clear of existing or future sewers rates and all other taxes, rates, charges, duties, assessments, impositions, and outgoings, (l) of what nature or kind soever, parliamentary, parochial, or otherwise, now or hrar to become payable either by landlord or tenant for or in respect of or charged upon the sd premes (except ppty tax); the first quarterly paymt of the sd rent of £ to be made on the day of .

4. [Landlord's title not to be required. See F. XIX., Cl. 11, p. 407.] (m)

Tenants to
build.

5. THE tenants shall, within the several periods hrar mentd, under the inspection or to the satisfaction of the landlord or his architect or surveyor for the time being, and at the costs and charges in all respects of the tenants, erect, build, and cover in, (n) upon the sd parcel of ground hrnbfr desed, in a substantial and workmanlike manner, and of the rate of building, character, and description specified in the specificon set forth in the first schedule hereto, (o) the messes hrar mentd: That is to say, on the part of the sd plan respily marked A and B, fronting the sd Road in afsd, 8 rate messes of uniform structure and appearance, and of the value of £ each at the least; four throf to be on the part of the sd plan marked A, and being on the north side of an intended street to be called Street, and intended to be connected with Place other ppty of the landlord; and the remaining 4 to be on

or otherwise dispose of the materials thereof, as the ease may be. It is sometimes stipulated that the old buildings on part of land shall not be removed until the surveyor, etc., certifies that sufficient work has been done to secure the rent.

(g) As to when buildings are held to be roofed in, see *Louthar v. Hearer*, 41 Ch. D. 248.

(h) If the completion of all roads and drains, etc., is not to be made a condition precedent, these words should be altered accordingly.

(i) If it is desired to limit the number of houses to be contained in one lease, as in the case of small houses, it should be here stated.

(k) If the nominee is to be previously approved of, these words should be altered accordingly.

(l) As to these words, see *post*, p. 430, note (c).

(m) For a form of clause providing for the investigation of landlord's title, see F. XXI., Cl. 2, p. 417.

(n) It should be observed that the lease in this form is to be granted when the houses are covered in. This is usual, as the builder may require to obtain advances upon the leases of such houses as are so far completed.

(o) If plans, etc., have been made, refer also to them as part of contract. See F. XIX., Cl. 3, p. 405.

the part of the sd plan marked B, and being on the south side of the said intended street: And also 50 rate money of the value of £ each at least, on the other part of the sd ground as marked and referred to on the sd plan by the letters C, D, E, F, G, and H, etc., and shall produce vouchers of the expenditure.

6. [Not to remove clay, gravel, etc., or burn bricks. Insert Cl. 6 of F. XIX., p. 406.]

7. THE said 8 messes to be fronting the said Road, which are to be the first messes erected, shall be covered in on or before the day of 18 , and shall be completed and fit for habitation, togr with all yards, easements, roads, ways, footways, boundary walls, pavements, and fences, on or before the day of 18 ; and the sd 8 messes shall be denominated ; and 20 at the least of the sd 50 messes to be built on the sd ground marked C, D, E, F, G, and H, etc., as afo, shall be covered in on or before the day of 18 , and shall be completed and fit for habitation, togr with all yards, easements, roads, ways, footways, boundary walls, pavements, and fences, on or before the day of 18 ; the remainder of the sd 50 messes, to be built as last afo, shall be covered in on or before the day of 18 , and shall be completed and fit for habitation, together with all yards, easements, roads, ways, footways, boundary walls, pavements, and fences, on or before the day of 18 .

8. THE tenants shall, within the respcve periods herebfo appointed for covering in the sd several messes respcly, at their own costs and charges, form all and every such areas and vaults in front of the sd several messes, and build area walls thro of such thickness in brickwork, with such springing walls, buttresses, and pannels, and well secured by clay covering, and shall put such stone curbs, and at such levels, as shall be respcly ascertained and required by the landlord or his architect or surveyor for the time being: And shall, at the like costs and charges, place boundary stones on the sd premises, so as to show and preserve the full extent of the same; and shall make such footways, and with such pavement, and so curbed, as shall be required by the landlord or his architect or surveyor for the time being.

9. THE tenants shall, at their like costs and charges, forthwith make and build such common sewers in or upon the sd ground as may be required by the landlord or his architect or surveyor for the time being, for the easement of the sd several messes so agreed to be built: And shall, at their like costs and charges, on or before the day of , make good carriage roads of such requisite widths as are described by the sd plan, and coloured brown: And also shall, at the like costs and charges, within the respcve periods herebfo appointed for completing and rendering fit for habitation the sd several messes respcly so agreed to be built as afo, make, form, build, and construct all other fit and appropriate yards, roads, ways, paths, pavements, vaults, channels, sewers, wydraughts, drains, and gutters, in, upon, through, under, or about the said premises respcly, and carry and connect such sewers, wydraughts, drains, and gutters so as to communicate with the sd common sewers so agreed to be built as afo, to the satisfaction of the landlord or his architect or surveyor for the time being: And also shall, at the like costs and charges, make all party and fence walls to the demised premises or any part thereof.

10. THE tenants shall, in laying out and forming all such roads, paths, main and other sewers and drains and other works, and in erecting all such houses as aforesaid, conform in all respects to the provisions of the Metropolitan Local Management Acts, (r) and of the London Building Acts, 1894 to 1905, and of

XX.

Agreement for Building Leases with Conditions If within the Metropolis. (Another form.)

Time allowed for building.

Tenant to form areas, vaults, etc.

—put curbs;

—place boundary stones;

—make pathways and build sewers;

—make carriage roads;

—and drains, yards, ways, etc.;

—and party walls;

—and conform to provisions of Building Acts, etc.

XX.

Agreement
for Building
Leases with
Conditions
if within the
Metropolis.
(Another
form.)

To keep in
repair;
—and enable
landlord to
inspect
premises.
Landlord to
have naming
of streets, etc.

Tenants not
to open com-
munication
with other
property, or
make other
roads except
those in
plan, etc.

Tenants to
have separate
lease or leases
on certificate
of landlord's
architect.

Tenants to
covenant in
lease,
to complete
building, etc.

Form of lease
in schedule.

Apportion-
ment of rent,
if more than
one lease.

all statutory modifications thereof for the time being subsisting, and to the provisions and specifications in that behalf contained in the first schedule hereto.

11. The tenants also shall from time to time, and at all times until a lease or leases shall be granted as herein provided, at their like costs and charges, repair and keep in repair, to the satisfaction of the landlord or his architect or surveyor for the time being, all and singular the said messes, erections, buildings, sewers, yards, roads, ways, paths, pavements, vaults, channels, wydraughts, drains, and gutters.

12. [*Insert power for landlord to enter and view work.* Cl. 14, F. XIX., p. 408.]

13. ALL the said messes, or the streets or places wherein the same respaly shall stand, shall, subject to the approval of the London Council, (q) from time to time during the said term of 99 years, be known, distinguished, and called by such name or names as the landlord shall direct.

14. AND the tenants shall not at any time or times during the said term hereby agreed to be granted, without the consent in writing of the landlord first had and obtained, make or form any road or way so as to communicate with any party of any person or persons whomsoever other than the landlord: and will not make any streets, roads, ways, courts, squares, or passages, on the said parcels of ground, except the said roads and passages shown on the said plan, or make any alteration in or deviation from the said roads and passages shown in such plan without such consent as aforesaid.

15. WHEN and as soon as the architect or surveyor for the time being of the landlord shall have from time to time made his report to the landlord, that any of the said messes, erections, and buildings respaly have been duly erected, built up, and covered in to his satisfaction, and according to the true intent and meaning of these presents, and when and so soon as the roads and main sewers and drains and other works hereby made obligatory on the tenants to form and make, shall have been formed and made as hereby agreed, (r) the tenants shall be entitled to have from time to time, at the option of the said tenants, one or more lease or leases (s) of the said messes, and of the parcel or parcels of ground whereon the same respaly shall be erected and built, or of such and so many of them respaly as the tenants may be desirous of having included in any one or more lease or leases, for the said term of 99 years:

AND in each of the leases and counterparts so agreed to be granted and made shall be contained covenants by the tenants, at their own costs and charges, to finish and complete the several messes so agreed to be built as aforesaid, together with all appurtenances, and render the same fit for habitation within the times hereby respaly mentid in that behalf, in a good, substantial, and workmanlike manner, with all necessary and proper fixtures and fastenings to the same respaly, according to the said specification, and to the satisfaction of the landlord or his architect or surveyor for the time being:

AND the said lease or leases shall in other respects be, as nearly as circumstances will admit, and with such alterations and additions (if any) as circumstances shall require, in the form, and shall also contain the exceptions, reservations, covenants, agreements, and stipulations set forth and specified in the second schedule hereto.

16. If more than one lease shall be granted, the said clear yearly rent of £ , on the tenant's executing a counterpart or counterparts of such lease

(q) See Part IV. of the London Building Act, 1894, *post*, p. 492.

(r) If the completion of all roads and drains is not to be made a condition precedent, these words should be altered accordingly.

(s) If it is desired to limit the number of houses to be contained in one lease, as in the case of small houses, it should be here stated.

or lease, shall be apportioned as hereinafter provided, that is to say, for each of the said 8 moyses to be erected in front of the _____ Street aforesaid, with their respective appurtenances, the clear annual rent of £ _____ shall be reserved; and for each of the said 50 moyses, to be erected as aforesaid, with their respective appurtenances, the clear yearly rent of £ _____ shall be reserved, so that a rent as aforesaid shall be reserved and made payable for every part of the said ground and premises to be demised. (t)

XX.

Agreement
for Building
Leases with
Conditions
if within the
Metropolis.

17. The tenants shall pay to the architect or surveyor for the time being of the land, for his or their time and trouble in and about the arrangement of the plans for, and the superintending the building of, the said several moyses, and about the premises incidental thereto, and for his or their time and trouble in and about the drawing out upon the said lease or counterpart, leases or counterparts, thereof, the plan or plans of the premises to be comprised in such lease or leases respectively, the sum of £ _____ guinea(s) for every moyses to be erected upon the said ground in pursuance of this agreement, and no more: And likewise all fees and other moneys which may become payable to any district or public surveyor in respect of the premises.

And other
Tenants to
pay architect's
and district
surveyor's
fees.

18. The tenants [before the ground floor joists] of the said moyses are respectively laid [or, as soon as any house is covered in], shall insure the same from damage by fire, and keep the same insured in the name of the landlord in the _____ Fire Insurance Office, or in such other office or offices as the landlord shall select, to the amount of [four-fifths] at least of the value of the same moyses respectively; and shall produce to the landlord, or to his agent, when required, the last receipt or the premium on the policy or policies; and as often as the said moyses, erections, and buildings shall be destroyed or damaged by fire shall forthwith apply all moneys received in rebuilding or repairing the same; and in case the said moyses shall be insufficient shall pay such sum of money as shall be sufficient in and towards rebuilding or re-erecting the same.

Tenants to
insure when,
etc.

19. The tenants shall apply for and accept a lease, or several leases, of the said parcel of ground, with the moyses or tenements, erections, and buildings to be thereon erected and built as aforesaid, under the terms and conditions herebefore expressed, without inquiring into or investigating the title of the landlord; and shall execute a counterpart or counterparts thereof respectively [and a memorial or memorials thereof for registration]; and the tenants shall pay the expense of preparing such lease and counterpart, or leases and counterparts [memorial or memorials, and of registering the same], and the expense of preparing and executing these presents, and the counterpart thereof, and also all other expenses of and relating to every such lease and to the premises.

Tenants will
accept lease
and execute
counterpart.

—and pay
expenses;

20. [Tenants to pay rent until lease granted and till then to occupy subject to condition. Insert Cls. 16, 17, of F. XIX., p. 402.]

—to pay rent
until lease
granted.

21. [Not to remove materials, Cl. 18, F. XIX., p. 402.]

22. In case the whole or any part of the said yearly rent or rental, or sum or sums of money, or any of them, to be paid by the tenants, until the granting of the said lease or leases, shall be unpaid for the space of 21 days next after any of the days of payment when the same ought to be paid, whether payment of the same shall be legally demanded or not; or if a receiving order in bankruptcy shall be made against the tenants, or they shall assign or make over their effects for the benefit of their creditors or any class of them, or compound or make any proposal to compound with such creditors; or in case the tenants shall not commence to

Provide for
re-entry on
non-payment
of rent, non-
performance
of covenants,
or on certain
other events.

(t) See other forms at p. 437.

(u) Either one fixed sum for the whole of the architect's work, or two sums will be made payable, one for certificates, etc., and the other for plans, etc.

(v) State here if necessary the fixed sum to be paid for each house or for several houses if more than one are included in the same lease.

XX.

Agreement
for Building
Leases with
Conditions if
within the
Metropolis.
(Another
form.)

carry out the provisions of this agrmt within _____ months from the date hrof [but this time shall if necessary be extended for any delay occasioned in obtaining posson of the sd premes], or in case the tenants shall not duly observe and perform the agrmts hrin contd for blding upon the sd piece of ground hrbly agrd to be demised, within the several periods (it being the intention of the parties hereto that time shall be deemed of the essence of this agrmt), and according to the stipulons hrin mentd, or any other the agrmts hrin contd on their part, or if there shall be a breach of any of the agrmts by the tenants hrin contd on their part, or if the tenants shall neglect or refuse to accept a lease or leases in accordance with the agrmt afsd, or to execute a counterpart of such lease or leases [or a memorial or memorials thereof], or to pay the charges of preparing, engrossing, and executing the same within one calr month after they shall have been requested so to do, then and in all or any one of the sd cases it shall not be obligatory on the landlord to grant the sd intended lease or leases in respect of the sd premes not then actually demised, but it shall be lawful for the landlord to re-enter upon, and to hold and enjoy the sd premes hrbly agrd to be demised, and the bldings erected, together with all materials, plant, and effects then being thron [or such part throf as shall remain undemised], freed and absolutely discharged from these presents, and from all right and interest whatsoever of the sd tenants under and by virtue of the same, and without making any compenson, it being the intent and meaning of the parties to these presents that in any of such cases as afsd the landlord shall, at his option, have full power to determine and make void this agrmt without prejudice to the recovery of any arrears of such yearly rent or sum of moy, rents or sums of moy, which shall remain due and unsatisfied: And the tenants shall not be discharged from any damages to which they may be or might have been otherwise liable for or on account of the breach of all or any of the agrmts hrin contd on their part, which ought to have been performed or remain unperformed; (x) [but the avoidance of this agrmt in manner afsd as to any part of the ground and premes in relation to which, or to the lease whrof, there shall be such default, neglect or refusal, shall not prevent this agrmt from remaining in force as to any of the sd pieces of ground and premes in relation to which, or to the lease whrof, no such default, neglect, or refusal shall have occurred]. (y)

Lease not to
be granted
till arrears of
rent paid.

—or while
house is
standing con-
trary to, etc.

23. The landlord further shall not be bound to grant any such lease or leases as afsd until all arrears of the said yearly rent or sum of moy, rents or sums of moy, hrbly agrd to be pd in the meantime, shall be fully paid and satisfied up to the granting of such lease or leases, or up to the quarter day of paymt next preceeding the granting of such lease or leases resply, if the same shall be executed before the last day of the current quarter, nor so long as any house or other blding shall be standing on any part of the sd piece of land (not comprised in any previous lease) which shall not have been erected in strict conformity with the provens of this agrmt.

24. [*Agreement to create a tenancy at will only*, Cl. 23 of F. XIX., p. 411.]

25. [*Operation of words "landlord" and "tenants,"* Cl. 24 of F. XIX., p. 411.]

26. [*Arbitration clause*, Cl. 22 of F. XIX., p. 411.] (z)

As witness, etc.

THE FIRST SCHEDULE ABOVE REFERRED TO.
(*To contain the specifications, etc.*)

THE SECOND SCHEDULE ABOVE REFERRED TO.
(*To contain the form of lease.*) [See F. XXVIII., p. 433.]

(x) See other forms for determining an agreement—F. VI., Cl. 13, p. 378; F. XIX., Cl. 19, p. 410; F. XXII., Cl. (e), p. 422; F. XXIV., Cl. 14, p. 425.

(y) The part in brackets will be omitted if the power of entry is to extend to all the land undemised.

(z) See another arbitration clause, F. XXI., Cl. 25, p. 421.

XXI.

Agreement
for Building
Lease.
Pulling down
and re-erect-
ing.
Parties.

XXI.

AGREEMENT FOR BUILDING LEASE; *providing for pulling down existing buildings and erecting new.* (a)

AN AGREEMENT made the day of , BETWEEN (*parties*).
WHEREBY IT IS AGREED AS FOLLOWS :

1. THE tenant shall, for the period of calendar months from the day of , have the right to enter upon the piece of land described in the first schedule hereto and delineated on the plan drawn in the margin hereof and thereon coloured pink for the purpose only of executing works and erecting buildings in accordance with the stipulations hereinafter contained. Right of entry for the purpose of building.

2. THE landlord shall, upon the written request of the tenant, within (*seven*) days from the date hereof, supply to the tenant at the office of Messrs. , of , the landlord's solicitors, an abstract of his title to the said land, commencing with *estate root of title*, and nothing earlier in date shall be the subject of investigation, requisition, or objection. Requisitions and objections, if any, which the tenant may be entitled to make, shall be sent in writing to the landlord's solicitors within (*fourteen*) days after delivery of the abstract, and, subject only to requisitions so made, the title shall be deemed to be accepted, and in this respect time shall be of the essence of the contract. If the tenant shall insist on any requisition or objection which the landlord shall be unable or unwilling to comply with or remove, the landlord shall be entitled (notwithstanding any intermediate negotiations or litigation), by notice in writing to the tenant or his solicitor, to annul this agreement, and in such case the tenant shall return to the landlord the abstract of title and any other papers in his possession, but no costs or compensation shall be payable by either party to the other. (*b*) Commencement and investigation of title.

3. THE tenant shall, before commencing to pull down any of the buildings now standing on the said piece of land (hereinafter called the old buildings), deposit in a bank, to be approved of by the landlord, in the joint names of the landlord and tenant, the sum of £ , which sum shall remain so deposited at the sole risk of the tenant, in trust nevertheless for the landlord on the happening of any event mentioned in Clause 17 hereof, and if no such event shall happen, then in trust for the tenant. Payment of deposit before commencing to pull down.

4. IN the event of the tenant failing to make such deposit as aforesaid, it shall be lawful for the landlord by notice in writing to revoke the licence and authority contained in Clause 1 hereof, and thereupon the tenant shall pay to the landlord the sum of £ in respect of his costs with reference to these presents, and in all other respects this agreement shall become void. In default of deposit landlord may determine agreement.

5. THE tenant shall, before commencing to pull down the old buildings, deposit with the landlord such drawings, plans, elevation, and sections of the Tenant to deposit plans of old buildings.

(a) Prepared by Messrs. J. H. Rolman, J. M. Lightwood, and Cecil Hartley, Esqrs., Barristers-at-Law, and taken from the *Encyclopedia of Forms*, Vol. VII., p. 310, by the kind permission of the publishers.

(b) A clause of this kind is desirable from the lessee's point of view, but is not usual in practice.

Or, the tenant shall accept the title of the landlord to the said piece of land, and shall not require to be furnished with any abstract or evidence of such title, or be entitled to make any requisitions or objections in respect thereof.

XXI.**Agreement
for Building
Lease.****Pulling down
and re-erect-
ing.**

Tenant to
shore up
adjacent
buildings.

Tenant not to
cause nuisance
and to be
liable in
respect of
easements.

Tenant to
maintain party
walls.

Tenant to
submit plans
of new
buildings.

Date for
removal of
old buildings.

New buildings
to be erected.

old buildings as the landlord may consider necessary, and also (if the landlord shall so require) photographs giving complete views of such buildings, both in front and rear, and showing their relation to adjacent buildings.

6. THE tenant shall, before commencing to pull down the old buildings, obtain the necessary licences for and set up sufficient hoardings and enclosures and shall perform all the shoring and other works necessary to uphold the adjoining buildings, and shall take all necessary steps to comply with the requirements in relation to such pulling down of any statute or local authority, and shall pay all fees and charges required for any such purposes.

7. THE tenant shall not in the course of pulling down the old buildings or of the execution of the other works hereby agreed to be performed, cause or allow any nuisance or do or permit anything which shall cause any unnecessary annoyance or disturbance to the occupiers of adjacent premises, and shall pay and indemnify the landlord against all claims for damage done in the course of such pulling down or otherwise in connection with the works hereby authorised, and also all claims and demands with respect to any alleged interference with or disturbance of light, air, or other rights or easements that any person may lawfully have or make in regard to the said premises.

8. THE tenant shall execute all works that may in the opinion of the landlord be necessary for the repair and maintenance of the party walls between the old buildings and other adjoining buildings so far as such repair and maintenance ought to be borne by the owner or occupier of the old buildings or of the buildings to be substituted for them.

9. THE tenant shall, before the day of , and before commencing to pull down the old buildings, submit to the landlord for his approval the plans, elevations, sections, and specifications of the new buildings hereby agreed to be erected, and shall at his own cost amend the same or submit others as often as he may be called upon by the landlord to do so until the same shall be finally approved and signed by the landlord or his surveyor for the time being, and the tenant shall sign and leave with the landlord for reference copies of such approved plans, elevations, sections, and specifications.

10. THE tenant shall proceed to pull down the old buildings not later than the day of , and shall remove the old buildings and the materials thereof (which shall be the property of the tenant), and shall clear out the site of the old buildings, but not deeper than is required for the foundations of the buildings and works agreed to be constructed, and solidly fill in with concrete all cess-pools and drains upon the said premises within calendar months from commencing to pull down the old buildings.

11. THE tenant shall, immediately after such removal and filling in, with all reasonable speed proceed to erect upon the said premises at his own cost a block of ten shops with four storeys of rooms for residential or business purposes over the same, with all proper offices, outbuildings, drains, and appurtenances (hereinafter called the new buildings). The new buildings shall be erected in a substantial and workmanlike manner with new and sound materials, the best of their several kinds, to the satisfaction of the said surveyor and in accordance with the plans, elevations, sections, and specifications to be approved as aforesaid, and the drainage thereof shall be so constructed that the drainage of each of the said ten shops, with the rooms over the same (*or as the case may be*), shall be independent of the drainage of any of the others, and also of any adjoining property. The tenant shall complete the new buildings in all respects, fit for immediate occupation, within the said period of calendar months from the said day of , and shall expend thereon in the cost price of materials

and labour alone a sum of £ at least, and, if required, shall produce to the landlord or his surveyor proper vouchers for such expenditure.

XXI.

Agreement
for Building
Lease.

Falling down
and re-erect-
ing.

Tenant to
remove bad
materials and
correct
deviations
from plans on
notice.

12. If in the course of erecting and completing the new buildings the tenant shall use any materials or execute any work which the said surveyor shall consider unsound or unfit for the purpose intended, or imperfect, or if any deviation shall be made from the approved plans, elevations, sections, and specifications, the tenant shall immediately, upon notice signed by the landlord or his said surveyor requiring him so to do, remove all such unsound or unfit materials and substitute such sound or fit materials as shall be approved of by the said surveyor, and make good such imperfect work and correct such deviations, and if the tenant shall neglect so to do for the space of (seven) days after such notice, then it shall be lawful for the landlord, his agents and workmen, to remove the unsound and unfit materials and to substitute therefor such as shall be sound and fit, and to make good the imperfect work and to correct every such deviation, and all his expenses of so doing shall be paid by the tenant on demand with interest from the date of outlay to the date of payment at the rate of £5 per cent. per annum.

13. The tenant shall erect and complete the new buildings under the inspection of the said surveyor (who shall be at liberty for that purpose to enter upon the said premises at all reasonable times) and also in accordance with the provisions of any statute applicable thereto, and with the regulations of any local or other authority having jurisdiction to regulate the same.

Works to be
done under
surveyor's
inspection.

14. The tenant shall not use or permit to be used any portion of the said premises or anything connected therewith as an advertising station or for the display of boards, posters, or notices, nor make any excavations upon any part thereof, nor remove any sand, gravel, clay, or earth therefrom except for the purpose of the execution of the said works.

Tenant not to
use premises
for advertising,
nor remove
gravel, etc.

15. The tenant shall, so soon as any buildings shall have reached a height of (20) ft. above the ground level, insure the same against damage by fire, in such insurance office as the landlord shall approve, in the joint names of the landlord and tenant to the full value thereof as certified by the said surveyor, and shall increase such insurance to the satisfaction of the said surveyor as the said buildings approach completion, and shall keep the same so insured from time to time, and shall, whenever required, produce to the landlord the policy or policies of such insurance, and the receipt or receipts for the premiums, and in case default shall be made in effecting such insurance or in producing such policy or policies, receipt or receipts, the landlord may insure the new buildings, and the expenses incurred in so doing shall be recoverable from the tenant on demand. In case the new buildings or any part thereof shall be destroyed or damaged by fire, the tenant shall lay out, to the satisfaction of the landlord or his said surveyor, all the money which shall be received by virtue of any such insurance immediately after the receipt thereof, with any further sum of money which may be requisite for the purpose in rebuilding or reinstating the said buildings.

Tenant to
insure.

16. The tenant shall, during the said period of calendar months, and subsequently, so long as he shall remain in occupation of the premises prior to the granting of the lease hereinafter mentioned, hold the same as tenant at will to the landlord at the same rent and subject to the same covenants and stipulations, so far as applicable, as the same would be subject to had a lease been a tenancy granted (save that for such period of calendar months the rent shall be one peppercorn, if demanded), and the landlord shall have all remedies by distress or otherwise for rent in arrear that are incident to the relation of landlord and tenant, but nothing herein contained shall be construed as creating a legal demise or any greater interest than a tenancy at will.

Until lease
granted tenant
to be tenant
at will.

XXI.

Agreement
for Building
Lease.Pulling down
and re-erect-
ing. _____

Right of re-
entry on
default in
completion
or other breach
of agreement.

Extension of
time in case
of labour
deposits.

Extension of
time at
discretion
of landlord.

Lease to be
granted on
completion
of works.

17. IN case any of the said dwelling-houses and buildings hereby agreed to be erected shall not be completed and fit for immediate occupation within the period hereinbefore limited (time in this respect being of the essence of the contract), or in case the tenant shall in any other way fail to perform and observe the stipulations on his part herein contained, (c) the landlord shall be at liberty to re-enter upon and take possession of the said piece of land and premises (except as to any portion whereof a lease shall have been granted in the meantime) and all buildings and erections, fixtures, plant chattels, and effects whatsoever thereon, and may hold and dispose thereof as if this agreement had not been entered into, and without making to the tenant any compensation or allowance for the same, and this agreement shall thereupon as to the premises so re-entered upon cease, but without prejudice to any right of action or other remedy of the landlord for the recovery of any rent or moneys due to him from the tenant, or in respect of any breach of this agreement.

18. PROVIDED, nevertheless, that if such default as aforesaid in completing the said dwelling-houses and buildings shall be attributable solely to labour disputes (d) affecting workmen employed on the said works, or any workmen employed in any trade generally relating to the building trade, then the landlord shall allow such further time for the completion of the said works as the said surveyor shall in writing certify to be reasonable.

19. PROVIDED, further, that notwithstanding any such default as aforesaid, the landlord may in his discretion give notice in writing to the tenant of his intention to enforce the tenant's stipulations herein contained, and may fix any extended period for the completion of the said works in substitution for the same period of calendar months hereby fixed for such completion, and thereupon the obligations hereunder of the tenant to complete the said works and to accept a lease (or leases) as hereinafter mentioned shall be taken to refer to such substituted period.

20. IF the said works shall be completely finished to the satisfaction of the said surveyor at the expiration of the said period of _____ calendar months, or of such extended period as shall be allowed or fixed by the landlord [under clauses 19 or 20 hereof], such satisfaction to be testified by the surveyor's certificate in writing [which shall not be unreasonably withheld], and the tenant shall have paid all rent and other sums payable by him under these presents, and shall have observed and kept all the stipulations herein on his part contained, then the landlord shall grant and the tenant shall accept and execute a counterpart of the lease of the said piece of land and premises, together with the dwelling-houses and buildings he erected thereon, and together with the pathway adjoining the said piece of land, and with right-of-way with or without horses, carts, or carriages, over the other moiety of the said new road, but excepting the free passage and running of water and soil coming from any other buildings and lands of the landlord and his tenants by and through the channels and drains of the demised premises, such tenants paying their proportion of the expense of cleansing and repairing the same, and also excepting full right-of-way for the landlord, his tenants and licensees, and the occupiers of the neighbouring lands and houses of the landlord, with or without horses, carts, and carriages, over the moiety of the said new road so to be demised (*and any other reservations*) (or with such rights and subject to such exceptions and reservations with respect to the said roadway and pathway as are contained in the form of lease in the second schedule hereto) for the term of _____ years from the _____ day of _____, at the yearly rent of £ _____, clear of all deductions except for landlord's property tax, and to be

(c) If a deposit has been paid (see Cl. 3), here insert the words, "the said deposit of £ _____ mentioned in clause 3 hereof, and all interest which may have accrued thereon, shall thereupon become the absolute property of the landlord, and be forthwith paid to him accordingly and."

(d) See p. 125 n., ante.

payable by equal half-yearly payments on the day of and the day of in every year, the money paid for rent under such tenancy at will as aforesaid being reckoned as part payment of any rent that would be due under such lease in respect of the same period.

XXI.

Agreement
for Building
Lease
Pulling down
and re-erect-
ing.

21. THE lease and counterpart shall be prepared by the solicitors of the landlord at the expense of the tenant (not exceeding £ , exclusive of stamp duty and registration fees, if any), and the tenant shall also pay to the landlord's solicitor the costs of the preparation and execution of these presents in duplicate (not exceeding £).

Preparation
and costs of
lease and
agreement.

22. THIS agreement shall remain in force as to any of the stipulations thereof which may not have been performed notwithstanding the grant of such lease as aforesaid.

Continuance
of agreement.

23. THE tenant shall pay all fees payable to any surveyor employed by a public authority, and all other fees and payments properly claimed by any such authority, and also the proper and usual fees and charges of the landlord's said surveyor, for work done by him in preparing or approving plans or inspecting the execution of the work, or otherwise in connection with the carrying out of the works authorized by this agreement.

Tenant to pay
all surveyor's
fees.

24. [*Tenant not to assign agreement. Here insert Cl. 10 of F. XVIII., p. 404.*]

25. IF any difference shall arise between the parties or their respective representatives touching their respective rights, duties, or liabilities under this agreement, the matter in dispute shall be referred to the determination of a single arbitrator in case the parties agree upon one, otherwise, to two arbitrators, one to be appointed by each party or their umpire in manner provided by the Arbitration Act, 1889, or any statutory modification or re-enactment thereof.

Arbitration
clause.

26. ALL notices, consents, and approvals to be given hereunder on behalf of the landlord shall be in writing, and, unless otherwise provided, shall be signed by the landlord, and all such notices shall be either delivered to the tenant or left for him at his usual or last-known place of residence or business in England or on the said premises.

Notices to
tenant.

AS WITNESS, ETC.

[*Signatures of both parties.*]

THE FIRST SCHEDULE ABOVE REFERRED TO.

[*Description of premises.*]

THE SECOND SCHEDULE ABOVE REFERRED TO.

[*Form of lease.*]

XXII

Additional
Clauses for
Agreements
for Building
Leases

ADDITIONAL or alternative clauses for insertion in agreements for building leases.

XXII.

(a) THE tenant will enclose and divide the gardens or yards of the said houses with brick walls, iron fencing, or oak posts and pales of ft ins in height as the architect shall direct, and will also enclose the spaces in front of the said houses with a stone curb and iron railings of a quality and pattern to be approved by the architect, and also will not erect any building or erection on the said piece of land or any part thereof except the said dwg-houses, walls, and fences as aforesaid, or make any addition to the said houses without the permission of the landlord or the architect in writing first obtained, and will use and permit the said

Tenant to
enclose, etc.,
gardens, etc.

Tenant not to
erect any other
building, but
private
dwelling-
houses only.

XXII.**Additional
Clauses for
Agreements
for Building
Leases.**

Tenant to pay
proportion of
keeping road
in repair,
—and of
making road
and sewer.

Lease to be
prepared by
landlord's
solicitor.

Form of lease.
Another form.

Alternative
form of power
of re-entry.

Option to
tenant to
purchase
reversion.

houses to be used as private dwg-hses only, and will not at any time make them or any of them into shops without such permission as aforesaid.

(b) THE tenant will pay to the landlord a due proportion of the expense of keeping the road and pathway in front of the sd houses hrby agrd to be built in good repair until the same shall be adopted by the local authority, such proportion to be fixed by the architect, and will also pay to the landlord the sum of £ , being £ as the tenant's contribution towards the expense of making the existing road and sewers, and £ for the paving done by the parish or other local authority, the sd sum of £ to be pd in sums apportionable in [*here state manner of apportionment*] to each of the sd houses agrd to be built and to be paid when the leases of the sd houses shall be resply taken up.

(c) THE lease or leases and counterpart or counterparts shall be prepared by the solers of the landlord and shall contain reservons, exceptions, and agrmts, covts, and provisos, similar to those contained in the leases of houses of the landlord on the estate, except as far as the same may be altered by the insertion of any additional covts or otherwise varied in order to make the sd lease or leases in conformity with this agrmt.

(d) "If the tenant fail to complete the houses ready for habitation by the time and in the manner hrhbfre stipulated, or to observe and perform any of the obligons and agrmts on his part hrin cntd, or if he become bankrupt or compound with his creditors [*insert "or dispose of any interest under this agrmt without the landlord's written consent," if such be the agreement*], or if default shall be made in paymt of the sd rent, etc., etc. (see F. XX., Cl. 22, p. 415), then, and in any such case, the landlord shall be entitled to resume and take posson of the land and bldngs (with all the materials and plant thron) which have not already been leased, and to keep the same as absolutely forfeited to him, without making any compenson to the tenant, but without prejudice to his other legal rights."

(e) (e) "If the tenant shall desire to purchase the fee simple of the sd [*describe land*], and shall at any time before the day of give to the landlord 3 mos' previous notice in writing of such desire, and at the expiron of such notice shall pay the price of £ , and all arrears of rent up to the day of completion of the purchase, then and in such case the landlord will convey the sd reversion [*describe property*] at the sd price of £ [*or the price may be " years' purchase of the ground rent"*] to the tenant; but the sd tenant shall not require any proof of the landlord's title [*or state conditions as to title*]. (f)

(e) As to the effect of such a clause, where the builder is in default, see p. 53, *ante*. The option must not infringe the rule against perpetuities, *Woodall v. Clifton* (1905), 2 Ch. 257.

(f) See also the following forms in the *Encyclopedia of Forms and Precedents*, Vol. VII. :—

(a) Agreement for building lease of site for several houses; lease to be granted after buildings finished; variations for separate leases, and where form of lease is contained in schedule.—General form (p. 282).

(b) Agreement for building lease of piece of land laid out in plots for various classes of buildings; leases at stipulated rents to be granted as buildings successively completed; provision for advances by landlord on security of buildings; option for tenant to purchase freehold in lieu of taking leases (p. 297).

(c) Agreement for improvements in existing buildings and erection of new buildings, and for leases on completion; roads to be laid out and drains constructed; deposit by way of security for completion of works (p. 316).

(d) Agreement for building lease; existing public-house to be pulled down and new one erected.—Short form (p. 322).

See also two forms of agreement in the *L. T. News*, Vol. 107, p. 132, and Vol. 108, pp. 126, 150.

XXIII.

AGREEMENT for a building underlease. (y)

AN AGREEMENT made, etc. *proceed as in F. XIX., p. 405.*

1. Power for the underlessee to enter to build. See F. XIX., Cl. 1, p. 405.]

2. THE landlord shall, when and as soon as the tenant shall have erected and built the messes and tenements in the manner herein stipulated to the satisfaction of the landlord's surveyor for the time being, and on the performance of the stipulations contained in an agreement dated the day of , and made between A. B. of the one part, and the landlord of the other part (corresponding to the stipulations herein contained), and the landlord shall be lawfully enabled thence, grant and execute to the tenant a lease of all, etc. [*parcels*] [*proceed as in Cl. 3 of F. XX., p. 412.*]

3. SUCH lease shall contain all and every the like (h) covenants, clauses, provisions, conditions, restrictions, and agreements as are contained in the lease by virtue whereof the said landlord shall then hold the said premises *mutatis mutandis*, and a covenant by the tenant to perform and observe all the said covenants and conditions (except, etc.) [*here state exceptions, such as covenant to pay rent*], and also a covenant by the landlord to indemnify the tenant from the payment of any other or former rent or rents than those which shall be reserved by the said intended lease, and from all costs and damages by reason of the non-payment thereof and all other demands whatsoever. [*Insert any other special covenants to be contained in the lease.*]

[*It will follow the agreement by the tenant to accept the lease, and pay expenses, the conditions as to the buildings to be erected, roads to be made, etc., and other clauses, as in former precedents.*]

IN WITNESS, ETC. .

XXIV.

AGREEMENT for a building grant in fee, in consideration of a perpetual rent-charge, of a plot of land, part of an estate laid out for building purposes. (i)

AN AGREEMENT made the day of Between A. B., of, etc. (herein called "the vendor"), of the one part, and C. D., of, etc. (herein called "the purchaser"), of the other part, whereby it is agreed as follows:

1. THE purchaser may immediately after the execution of this agreement, for the purpose, etc. [*proceed as in Cl. 1 of F. XIX., p. 405.*]

2. THE purchaser shall bear and pay the land tax and all other taxes, rates,

(y) See p. 51, as to precautions to be taken with respect to the covenants in the original lease. A form of agreement by a company for underletting part of premises comprised in an agreement for a building lease to build as company's nominee accepted by the lessor is set out in the *Encyclopedia of Forms*, Vol. VII., at p. 325. See Form of Building Underlease, F. XXXI., p. 413.

(h) See *Williamson v. Williamson*, L. R. 9 Ch. 529; *Haywood v. Silver*, 30 Ch. D. 404, noted ante, p. 54.

(i) This form might, with few alterations and omissions, be adapted to an absolute sale of the land for building purposes at an agreed price. See the form of Building Grant, F. XXXII., post, p. 418.

XXIII.

Agreement for Building Underlease.

Parties.

Agreement by lease to grant lease, when, etc.

Such lease to contain covenant to perform covenants of original lease and, etc.

XXIV.

Agreement for Building Grant in consideration of Rent-charge.

Parties.

Power of entry to purchaser.

Purchaser to pay taxes, etc., as if land conveyed.

XXIV.

duties, assessments, and outgoings in the same manner as if the sd plots of land had been conveyed to him.

**Agreement
for Building
Grant in con-
sideration of
Rent-charge.**

Purchaser to
build houses ;
Purchaser to
enclose land.

3. [*Insert agreement to build, adapting the clause of one of the preceding precedents of agreements for building leases, e.g. Cl. 2 of F. XVIII., p. 403.*]

4. THE purchaser will within the period herebefore limited for the completion and finishing of the houses to be erected on the sd pieces or plots of land enclose each of the same with [*insert the particular mode of enclosure to be stipulated for, e.g. Cl. a. of F. XXII., p. 421.*]

Vendor will
execute grant
when houses
completed to
satisfaction
of architect.

Uses.

Rent-charge.

5. WHEN and so soon as the sd houses and other works as aforesaid shall be erected and completed in such workmanlike manner, and finished fit for habitation as herebefore agreed, and in addition thereto when and so soon as the architect shall have given his written certificate that the sd houses and other works are finished and complete and fit for habitation to his satisfaction, the vendor shall execute and the purchaser shall accept a conveyance of the sd plots of land and the buildings erected thereon with the appurtenances following (that is to say), to the use that the vendor may from the day of and for ever receive out of the sd heres the clear perpetual yearly rent-charge of £ per annum to be issuing out of and charged upon the same, and to be paid by equal half-yearly payments on the day of and the day of in every year, free from the land tax and all other rates, taxes, charges, duties, assessments, and outgoings now affecting or hereafter to affect the sd heres and premises and from all deductions (except the property tax), the first half-yearly payment to be made on the day of : and subject to the sd rent-charge and to the statutory powers and remedies (k) for recovery thereof, to the use of the purchaser in fee simple. The purchaser shall execute a counterpart of such conveyance. The sd conveyance and counterpart shall be prepared by at the expense of the purchaser.

To purchaser
in fee.

Form of
conveyance.

6. SUCH conveyance shall be, as nearly as circumstances will admit, and with such alterations and additions (if any) as circumstances shall require, in the form set forth in the schedule hereto, and shall contain a power of re-entry by the vendor, in case the sd rent-charge or any part thereof shall be in arrear as aforesaid, (l) or in case of breach by the purchaser of any of the covenants and provisions to be contained in the grant, and shall also contain, in addition to all usual covenants, (m) the covenants agreements and stipulations by the purchaser set forth and specified in the sd schedule (n).

Vendor's title.

7. THE purchaser is satisfied with, and accepts, the vendor's title.
[Or insert here conditions as to commencement and evidence of title, Cl. 2 of F. XXI., p. 417.]

Purchaser
shall not dig
for gravel
etc., or burn
bricks ; and
will remove
rubbish.

8. *Insert Cl. 6 of F. XIX., p. 406, and proceed :* And the purchaser shall, as soon as the sd houses shall be completed, at his own expense, remove all rubbish from so much of the road marked in the said plan as is opposite thereto.

(k) *Ante*, p. 217, as to the remedies for recovery of rent-charges. See now s. 44 of the Conveyancing and Law of Property Act, 1881, for the remedies therein provided for the recovery of annual sums charged on land, *ante*, p. 217.

(l) See note (k), *supra*.

(m) As to what are "usual covenants," see *ante*, p. 55.

(n) If the covenants to be contained in the grant are inserted in this agreement, see the form of building grant, F. XXXII., p. 448.

9. ALL boundary fences and divisions, when made as herebefore mentd, shall be used as party walls by any person or persons building upon the plots or plots adjoining, he and they paying a proper proportion (to be ascertained by the architect) of the expenses thereof.

XXIV.

Agreement for Building Grant in consideration of Rent-charge.

10. [Purchaser will insure houses as covered in. See Cl. 18 of F. XX., p. 415.]

Boundary fences to be used as party walls.

11. THE purchaser shall be entitled to have the sd pieces or plots of land conveyed to him by [state number] conveyances instead of one, and each of such conveyances shall be in the form, and in accordance with the agrmts herebefore mentd, except that, if such separate conveyances are required by the purchaser, the perpetual yearly rent-charge shall be £ without any deduction as afd for each of the sd pieces or plots of land resp'y, with like powers as in all respects as herebefore stipulated: PROVIDED that the purchaser shall not be entitled to a conveyance of part of the sd pieces of land under this clause, unless at the time of such conveyance he shall have proceeded with the erection of and covered in at least houses on the land remaining unconveyed, and shall have complied in all respects with the provisions and stipulations herein contd. Every conveyance and counterpart or duplicate to be made in pursuance of this clause to be prepared by Mr. and at the expense of the purchaser as herebefore provided.

Purchaser entitled to have land conveyed in lots.

Rent-charge to be apportioned.

Proviso that certain number of houses must be covered in before conveyance of one part of land.

12. [Insert Cls. 16 and 17 of F. XX., p. 414, and proceed:] And the vendor shall also, until the sd plots of land shall be conveyed, have such or the like power of distress, and the right and authorities incident thereto, for the recovery of the sd rent-charge or rent-charges as landlords have under leases for years.

Conditions until land conveyed.

13. THE purchaser shall, on the signing hereof, pay to Mr. the sum of towards the expense of preparing, executing, and stamping this agrmt. (p

Purchaser to pay cost of this agreement.

14. [Insert Cl. 18 of F. XIX., p. 409, using the words "vendor" and "purchaser" instead of "landlord" and "tenant."]

15. IN case the purchaser shall make default in the observance and perfeo of his part of this agrmt in any parlar, or if the purchaser shall become bankrupt or make any composition with or any assignment for the benefit of his creditors, then and in any such case it shall be lawful for the vendor (notwithstanding the waiver or omission to take advantage of any previous breach of this agrmt) to re-enter upon the sd plots of land, other than and except such pieces or plots thereof (if any) as may have been previously conveyed to the purchaser, and either by a notice in writing, to be delivered to the purchaser, or left for him at his usual or last known place of abode in England (which notice, notwithstanding the death of the purchaser or any other circumstance, shall be sufficient), absolutely to determine this present agrmt, so far as relates to such portion of the sd land as may not previously have been conveyed to the purchaser as afd, and thereupon such portion of the sd land as may not previously have been conveyed to the purchaser, together with the buildings thereon, and all building materials, plant, and other things which, under the conditions of this agrmt, are provided to become the property of the vendor and be attached to and to belong to the same land or the buildings thereon, shall be and remain the absolute property of the vendor, freed and discharged from all claims and demands of the purchaser in respect thereof, or otherwise on account of this agreement.

Building materials cannot be removed.

Power of vendor to enter and determine this agreement.

Building materials to be property of vendor if agreement determined.

(i) See note (k), ante, p. 424. See ante, pp. 218, 219, as to apportionment.

(p) Insert here agreement (if any) as to payment of the vendor's surveyor's fees for certificate and plans, etc. See F. XX., Cl. 17, p. 415.

XXIV.

**Agreement
for Building
Grant in con-
sideration of
Rent-charge.**

Interpretation
clause.

18. The expression "the vendor" used in these presents shall extend to and include the heirs and assigns of the said A. B., and the expression "the purchaser" shall extend to and include the heirs, exors, admors, and assns of the sd C. D., in like manner as if they had been respdy named hrin next after the words "vendor" and "purchaser" respdy throughout, so far as the same will admit and unless the context or the nature of the case may require a fresh construction.

AS WITNESS, ETC.

SCHEDULE.

(Containing the form of conveyance.)

SECTION III.

BUILDING LEASES, ETC.

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XXV.

FORM OF ADVERTISEMENT for tenders for taking on building lease.

To BUILDERS AND OTHERS.—The undersigned are prepared to receive tenders for taking on building leases for years (the year at a peppercorn), with option of purchase, the plots of ground situate, etc., for the purpose of building thereon , in accordance with conditions and plans, etc., copies of which, with forms of tender, may be obtained at .

XXV.
—
**—for Tenders
for Building
Leases.**

The undersigned do not bind themselves to accept the highest or any tender.

The tenders are to be sealed, endorsed as directed in the form of tender, and addressed to the undersigned.

Dated the day of .

XXVI.

FORM for making tenders for plots of land to be let on building leases. General conditions as to houses to be built, and other works, and as to granting leases. Main road constructed by freeholder and proportion to be paid by builders.

XXVI.
—
**—Tenders for
Land on
Building
Leases.**

CONDONS for LETTING plots of ground on the side of , and the

(a) See also the following forms in the *Encyclopedia of Forms*, Vol. VII.: (a) Building lease of land for 99 years for erection of dwelling house; variations where house partly erected (p. 837); (b) Building lease granted by freeholder to builder's nominee at original ground rent; improved rent secured to builders by creation of rent charge (p. 848); (c) Building lease of freehold land for 999 years (p. 857); (d) Building lease of copyhold land in Lancashire for 999 years by surrender and lease of even date (p. 862). For a form of building lease by tenants in common, see *Hythwood and Farnham's Conveyancing*, Vol. III., p. 416. For a form of lease for the purposes of a sliding railway or lift, see *L. T. News*, Vol. 109, p. 124.

	side of , etc., in the coy of , coloured on the accom-
XXVI.	panying plan.
Tenders for Land on Building Leases.	
Plans, etc., to be previously approved by freeholder.	1. THE blders are to erect good and substantial brick or stone messes or tenements, in strict accordance with block and other plans and elevations, figured in detail, and specificons, to be submitted to and approved by the freeholder or his surveyor for the time being in writing, before any of the bldings are commenced.
Plan to show site.	2. EVERY block plan shall show the exact site of every house, and the walls or fences separating the plot on which each house is to be erected.
Time for building.	3. EACH of the messes or tenements is to be erected and covered in within calr months from the commencement of the blding of each such messe, and finished and completed within months next thrar, and the whole of the houses to be erected upon the sd ground are to be completed within years from the commencement of the term.
Drainage.	4. THE blders are to make and construct such drainage and other works connected with the public sewer or otherwise as may be directed by the freeholder's surveyor for the time being.
Footpath.	5. THE blders are to form and construct the footpath in front of the sd houses as soon as each house is completed, as directed and approved by the sd surveyor for the time being.
Boundary walls.	6. ALL boundary walls or fences are to be approved of by the freeholder's surveyor for the time being.
Rents.	7. FOR each of the plots coloured the builders are to pay £ per annum for the first year of the term, and for the plot coloured £ per annum for the first year of the term, £ for the second year, £ for the third year [<i>insert full particulars</i>].
Term.	8. THE term of lease will be years from the day of .
Main roads constructed by freeholder who reserves certain rights.	9. THE freeholder has constructed the roads and sewers now formed by and at his cost, and the sd freeholder reserves to himself and his agents at all times the right to enter upon the land, and use so much of any of the plots as may be necessary for the making of the sd roads or sewers, or for burning clay for ballast, or for the deposit or removal of soil or earth.
Builders to contribute according to frontage.	10. THE blders are to contribute towards the cost of making such roads and sewers as afsd at the rate of £ per ft frontage for all land abutting upon the sd roads.
Repair of roads until dedicated to public.	11. THE blders shall maintain and keep in repair the roads and footpaths, or, at the option of the freeholder, pay such sum of money in lieu throf from time to time as the sd freeholder, or his surveyor for the time being, may direct, unless and until such roads be with the consent of the sd freeholder dedicated to the public.
Taxes, etc.	12. THE blders shall pay the land tax, if any, and all other taxes, rates, duties, and assessments of every description, now or hrar to be imposed on the premes or on the landlord or tenant throf for the time being in respect throf.
Security to be provided.	13. THE blders will provide such security for the due perfee of each contract as may be required by the freeholder.
Form of lease.	14. SEPARATE leases will be granted to the blders or their nominees, at such

apportioned rents as the freeholder's surveyor for the time being shall certify to be fair and reasonable, and such leases will be in the form of lease deposited at , and marked .

15. THE blders must give all requisite notices under any Acts of Parliament or orwise, and pay all fees and charges which during the progress of the works may become payable under or by virtue of any Act or Acts of Parliament, byelaws of local board, or orwise.

[State here any conditions as to paying the fees of the freeholder's surveyor.]

16. THE blders shall at all times, at their own cost, provide a foreman or clerk of the works to be present during working hours, and any notice or direction to be given to such foreman or clerk of the works by the freeholder or his surveyor for the time being shall be deemed to have been given to the blders.

17. THE leases and counterparts are to be prepared by the freeholder's solicitor, at the cost of [here state cost for each lease and counterpart, or one lease of several lots, and whether exclusive of plans, stamps, and registration] to be defrayed by the blders or their nominees.

18. [Insert here any conditions as to the insurance of the houses when covered in, and also restrictions as to trades and shops, etc.]

19. THE tender at the foot hereof must be signed by the party tendering, sealed up, addressed to the , and endorsed . The tender must be left at , on the day of . No tender will be received that is not made on the printed form.

20. A TENDER may be made for one or all of the sd plots of land. The party or parties whose tender may be accepted will be required to execute a contract in the form deposited at . (b)

[State here any other conditions as to the tender.]

21. THE freeholder does not bind himself to accept the highest or any tender that may be recd.

To (insert name of freeholder here), hereby called the freeholder.
I hereby offer to take a lease of the plot of ground and coloured on the plan aforesaid for the term of years and subject to the covenants and conditions and in accordance with the form of lease above mentioned at the clear yearly rent of .

Date . Signature in full .
Residence .

XXVII.

XXVII.

LEASE to builders of houses erected by them in accordance with an agreement for building leases. Covenant to complete houses, not to erect other buildings, not to alter plan, etc. Right of way and of passage of water, etc. Proviso that on adoption of roads, etc., by parish, covenant to repair road shall cease; and other suitable covenants and provisions. (See F. XX., p. 411.)

Lease to Builders in accordance with Building Agreement.

THIS INSTRUMENT, made the day of , 18 , BETWEEN A. B., of (hereinafter called "the lessor"), of the one part, and C. D., and E. F., of , blders

(b) If the contract to be afterwards executed contains a power to the freeholder to enter and determine the agreement in case the builder fail to build as agreed, it will be unnecessary to insert such a provision here.

XXVI.

Tenders for Land on Building Leases.

Separate Leases.

Builders to pay fees, etc.

Builders to provide foreman to whom notices may be given.

Expense of leases and counterparts.

Tender to be signed, etc.

Tender may be made for all.

Contract to be signed if tender accepted.

Not bound to accept highest or any tender.

XXVII.

**Lease to
Builders in
accordance
with Building
Agreement.**

Testatum.

Parcels.

Right of way
over other
half of road.

Right of
passage of
water and soil.

Exceptions.

(hmar called "the lessees"), of the other part, WITNETH that in conson of the expenses which the lessees have sustained in building, and which they will sustain in finishing, the messes or tenements and bldgs hmar described and demised, and in conson of the yearly rent hmar reserved, and of the covts, provisos, and condons hmar contd, and on the part of the lessees to be observed and performed, the lessor doth hby demise unto the lessees: ALL that parcel of ground situate, etc. [referring to plan] and all those newly erected messes or tenements and bldgs [describe buildings] now standing on part of the same parcel of ground and coloured in the sd plan: And also all that other parcel of ground being one equal moiety of the road to be called , and in the sd plan delineated and therein coloured , TOGETHER with full right of passage and way for all persons, carts, carriages, and animals to and from the said first-mentioned parcel of ground and messes or tenements and bldgs over the other moiety of the sd road, and over all other streets in the vicinity of the said road belonging to the lessor: AND TOGETHER with full right of passage and running of water and soil from the said first-mentioned parcel of ground and messes or tenements and bldgs through the main sewer or drain which runs under the sd road [exceptions as to minerals, see F. XXVIII., p. 433]: EXCEPT AND reserving all rights (if any) restricting the free use of any adjoining land of the said lessor or the appropriation at any time hmar of such land for building or other purposes, and EXCEPT NEVERTHELESS AND RESERVING full right of passage over the moiety of the sd road hby demised, for the lessor, his [heirs or executors, administrators](c) or assigns, and for all other persons and carts, carriages, and animals to and from all lands and houses in the vicinity of the sd road belonging to the lessor, his [heirs or executors, administrators] or assigns, or his or their tenants: AND ALSO full right of passage and running of water and soil from all such lands and hses as afsd, through the main sewer or drain afsd, and through all other drains, channels, and sewers in or under the sd parcels of ground hby demised or either of them:

Habendum.

TO HAVE AND TO HOLD the premes hby demised unto the lessees, for the term of years, from the day of , 18 :

Reddendum.

YIELDING AND PAYING therefor yearly and every year during the sd term the rent of £ by equal quarterly payments on the day of , the day of , the day of , and the day of ,

First payment.

the first of such payments to be made on the day of next, and the last quarterly payment to be made in advance on the day of next before the expiration of this demise: AND ALSO YIELDING AND PAYING a proportionate part of the sd rent for any period which may elapse between any of the afsd quarterly days of payment and the period of the determinon of the sd term, in case the same shall happen to determine under the proviso for that purpose hmar contd; such proportional rent to become payable immedly upon such determinon: THE SD RENT to be paid clear of all deductions:

Covenants by
the lessees:

AND THE LESSEES hby jointly and severally covenant (with intent to bind their assigns) with the lessor

—to pay rent;

THAT they the lessees, their exors, admors, or assigns will during the sd term pay unto the lessor the rent hby reserved, at the times and in manner afsd, without any dedon or abatement whatsoever:

and taxes;

AND will pay and discharge any land tax, (d) and also the sewers rate, and all other taxes, rates, charges, duties, assessmts, and outgoings, (e) of what nature

(c) If the property be freehold, put "heirs and assigns;" if leasehold, "executors, administrators, and assigns," throughout. See s. 58 of the Conveyancing Act as to covenants relating to land binding heirs, etc., as if they were expressed. In the case of an underlease, see ante, p. 240, as to the lease containing an express covenant by the sub-lessee to perform all covenants, etc., in the original lease. See the Form of a Building Underlease, F. XXXI., at p. 443.

(d) And see the agreement, F. XX., Cl. 3, ante, p. 412.

(e) The following is an alphabetical list of all the more important words and phrases used in covenants of this kind the meaning of which is likely to give rise to difficulty in practice. A note of the relevant cases is appended to each word or phrase:—

"Assessments:" *Wilkinson v. Collyer*, 13 Q. B. D. 1; *Aldridge v. Ferne*, 17 Q. B. D.

or kind soever, parliametary, parochial, or otherwise, now or here to become payable during the sd term, either by owner, landlord, or tenant, for or in respect of the sd premises hereby demised, or any part thereof, or the sd rent reserved for the same (except the landlord's petty tax):

And will at their own expense finish and complete the sd messes and tenements or bldings hereby demised, and all outbuildings, walls, fences, yards, gardens, roads, ways, paths, pavements, vaults, channels, sewers, wydraughts, drains, gutters, and appurts, in a good substantial and workmanlike manner, with all necessary and proper fixtures and fastenings to the same resp'y, and render the same fit for habitation on or before the day of and to the satisfaction of the architect or surveyor for the time being of the lessor:

And also will at their own expense during the said term well and sufficiently repair, (S) uphold, amend, support, maintain, glaze, pave, cleanse, and keep the sd demised premises with the appurts in good and substantial repair, together with all the walls, fences, gates, drains, roads, ways, and appurts thereunto belonging, and all bldings, erections, and other fixtures and things, which at any time during the sd term shall be erected and made, when, where, and so often as need shall be:

And will paint in proper colour all the external wood and iron work which, from time to time during the said term, shall be in, upon, or belonging to, the same premises, once in every [third] year (y of the sd term with three coats of paint, mixed in good oil; and paint in like manner the inside wood, iron, and other work usually painted, and wash, stop, whiten, or colour such parts of the said premises as are now plastered once in every [seventh] year of the sd term:

And also will during the sd term at the like expense keep the said premises insured [in the name of the lessor] in the Fire Insurance Office, or in such other office or offices as the lessor shall from time to time select and name, to the amount of [four-fifth] at least of the value of the said messes or tenements and bldings:

And will, when required, produce to the lessor and to his steward, agent, or receiver of rents for the time being all policies of assurance and the receipts for all premiums and other sums payable in respect thereof, and will lay out the insurance moneys in properly rebuilding and restoring any of the said messes or bldings that may have been destroyed by fire; and in case the sd moneys

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Lease to
Builders in
accordance
with Building
Agreement.

—to complete
the buildings;

—to repair;

—to paint
outside;
—inside;

—and to
insure;

—and produce
receipts;
—rebuild in
case of fire;
—and pay
deficiency.

212; *Lumby v. Fauspel* (1901), 20 T. L. R. 237. "Assessments and impositions:" *Tidwell v. Wetherill*, L. R. 2 C. P. 325; "Burdens:" *Sweet v. Seager*, 2 C. B. N. S. 119. "Charge" or "charge:" *Hartley v. Hudson*, 4 C. P. 11. 367. "Duties:" *Sweet v. Seager*, 2 C. B. N. S. 119; *Brett v. Rogers* (1897), 1 Q. B. 525; *Abbridge v. Ferne*, 17 Q. B. D. 212; *Haz v. Rata* (1899), 1 Q. B. 474; *Daulger v. Arding* (1902), 1 K. B. 701; *Farmer v. Strenson* (1900), 1 Ch. 124. "Duty or assessment:" *Thompson v. Lapworth*, L. R. 3 C. P. 119. "Imposed upon the landlord or tenant thereof:" *Thompson v. Lapworth*, *supra*. "Imposed upon the lessor in respect thereof:" *Smith v. Robinson* (1898), 2 Q. B. 53. "Impositions:" *Hill v. Edward*, W. N. 1885, p. 32; *Goldstein v. Hollingsworth* (1901), 2 K. B. 578. "Impositions and outgoings:" *Goldstein v. Hollingsworth*, *supra*. "Land tax and all other rates:" *Southall v. Leatherbar*, 8 T. R. 458. "Outgoings:" *Widley v. Ferne*, 17 Q. B. D. 212; *Batchelor v. Hager*, 60 L. T. 416; *Pulger v. Arding* (1892), 1 K. B. 701; *Morris v. Beal* (1901), 2 K. B. 584; *Tidwell v. Wetherill* (1897), 1 Q. B. 74; *Attil v. Galsara* (1899), 63 J. P. 441; *Barrett v. Tigg* (1899), 1 Ch. 231. *Hornor v. Franklin* (1901), 2 K. B. 877; *Valley v. St. Lawrence W. Inf* (1903), L. G. R. 11; *Goldstein v. Hollingsworth* (1901), 2 Ch. 578; *Leahy v. M. & C.*, 5 C. P. D. 481; *Arding v. Lapworth*, 79 L. T. 622; *Attil v. Galsara*, *infra* (1901), 1 Ch. 493. "Outgoings charges in respect of the demised premises:" *Croft v. Lee*, 9 Ex. 204. "Outgoings payable in respect of the premises:" *Stoddard v. Leherberg* (1903), 1 K. B. 878. "Parliamentary and parochial:" *Wetherill v. Tidwell*, 2 C. & K. 17; *Attil v. Galsara*, *supra*. *Parliamentary Commissioners*, 7 Ex. 777. "Payable either by landlord or tenant:" *Abbridge v. Ferne*, 17 Q. B. D. 212; *Hill v. Edward*, W. N. 1885, p. 32. "Payable in respect of the premises:" *Farmer v. Strenson* (1900), 1 Ch. 124. "Rates and assessments:" *Attil v. Galsara*, 9 Q. B. D. 622. "Taxes:" *Attil v. Galsara*, 12 Mod. 54; *Attil v. Galsara*, 6 B. & C. 271.

(f) As to the covenants to repair in building leases, see Chap. XIX., s. vi., p. 23, *ante*.
(g) The words "in every third year" will be more advantageous to the landlord, and "in every three years" to the tenant.

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**Lease to
Builders in
accordance
with Building
Agreement.**

On default,
lessor may
pay and re-
cover amount ;

—not to erect
buildings
on premises
which may,
etc. ;

—not to alter
plan, eleva-
tion, etc. ;

—to pay
proportion
of repairing
roads, etc. ;

—to permit
lessor to
enter and
take inventory,
etc. ;

—and to see
condition of
premises ;

—to permit
workmen to
enter to repair
adjoining
premises ;

—to use pre-
mises as a
private dwell-
ing-house
only, etc.

—not to
suffer annoy-
ance, etc. ;

—not to as-
sign without
licence ;

—to yield up
premises in
repair at end
of term.

shall be insufficient, the lessees shall pay such sum and sums of m^y as shall be sufficient in and towards reblding, restoring, or reinstating the same :

AND in case at any time the lessees shall not duly pay the sd premiums of insurance, it shall be lawful for the lessor to pay the same, and the sum or sums so paid for insurances shall be recoverable by the lessor from the lessees :

AND will not erect, or permit to be erected, on any part of the garden or yard, or on any other part of the sd premes, any bldings whatsoever which may lessen the air, obstruct the light, or in any way interrupt the views from the adjoining bldings, (h) or destroy the uniformity of the same premes, or cut or maim any of the principal timbers or walls of the bldings hereby demised :

AND will not make any alteron in the plan and elevation of the said premes, or in the architectural decorations throf [or in any party wall or in the principal or bearing walls or timber] without the previous licence in writing of the lessor first obtained for the purpose :

AND also shall at all times pay a fair and just proportion towards the expense of renewing, repairing, and cleansing all ways, roads, pavements, party walls, or fences, gutters, pipes, drains, sewers, watercourses, and wydranghts which at any time during the sd term shall belong to the sd premes, or which shall be used in common by the occupiers of the sd demised premes and the occupiers of any other messes, dwg-hses, or bldings already erected, or hrar to be erected, on any part of the now estate or of any other land belonging to the lessor near or adjoining thereto ; such proportion to be fixed and ascertained by the architect or surveyor for the time being of the said lessor :

AND also will permit the lessor and his agents, surveyors, workmen, or others, to enter into and upon the premes demised at all reasonable times during the sd term to view the state and condon throf, and to take an inventory of the fixtures thupon, and of all defects and want of reparation found to give or leave notice in writing at the sd demised premes :

AND will repair within 3 calr mos according to such notice, and to the satisfaction of the lessor or his architect or surveyor for the time being, such defects and want of repair :

AND will permit etc. [*see covenant to permit workmen of lessor to enter to repair adjoining premises, etc., F. XXVIII., p. 436.*]

AND also will not convert, use, or occupy the sd premes or any part throf into, or as, a shop, warehouse, or any other place for carrying on any trade or business whatsoever, or suffer the sd premes to be used for any such purpose or otherwise than as a private dwg-hse without the consent in writing of the lessor : (i)

AND will not do, or cause or suffer to be done, any act which may be or grow to be a nuisance or an annoyance, damage, or disturbance, to the lessor or any of the tenants or occupiers of other land or bldings of the lessor, or of adjoining lands :

AND will not assign the sd premes or any part throf without the licence in writing of the lessor : (k)

AND also will peaceably surrender up and leave the sd premes at the expiron or other sooner determinon of the sd term, togr with all fixtures and other things belonging thrtto, and all other buildings, erections, or fixtures which at the expiron or other sooner determinon of the sd term, or at any time during the last [seven] years throf, shall be built or erected, or in any way fixed or fastened to the sd premes, in good and substantial repair and condon in all respects. (l)

(h) The above covenant may not be sufficiently restrictive, and it will probably, in many cases, be advisable that the covenant should be so worded as to prohibit the erection of buildings above a certain height ; or see another form in F. XXVIII., at p. 436.

(i) See p. 229, *et seq.*, as to the law with respect to covenants of this description.

(k) If the lease is for several houses, the covenant against assignment is not reasonable. If the lessees are not to underlet, insert after the word "assign" the words "underlet or part with the possession of." See F. XXVIII., p. 437 for form where the lessees may assign, but are to leave the deed with the lessor for registration.

(l) The words "reasonable wear and tear excepted" are in some few cases inserted,

PROVIDED ALWAYS that so soon as the sd road, and the sewer and drain under the same, shall be wholly or partially adopted by the parish or other authority as a public road, sewer, and drain, all obligations under the covt hmbfre contd to repair the same shall cease to the extent to which the said road, sewer, and drain may be adopted by the parish or other authority as afd, in which case the lessees will be liable under the covt to pay taxes and rates, etc., hmbfre contd:

PROVIDED ALSO that if and whenever any part of the rent hrbly reserved shall be in arrear for 21 days next after any of the days when the same ought to be paid as afd, whether the same shall have been legally demanded or not, or if and whenever there shall be a breach or any non-observance or non-perfice of any of the covts hmbfre contd and on the part of the lessees to be observed and performed, (m) then, and in any of the sd cases, it shall be lawful for the lessor, notwithstanding the waiver of any previous cause or right of entry, to re-enter upon any part of the sd prem^s in the name of the whole, and thrupon the said term of years shall absolutely determine:

AND the lessor hrbly covts with the lessees that they, the lessees, paying the sd yearly rent of £ in manner afd, and observing and performing all the covts hmbfre contd, and on their part to be observed and performed, shall and may peaceably and quietly hold and enjoy the sd prem^s and premises hrbly demised during the sd term, without any eviction or disturbance by the lessor, his [heirs or executors, administrators] or assigns, of any person or persons claiming by, from, or under him, them, or any of them. AND it is hereby lastly agreed and declared, etc. [*Insert clause as to operation of the words "lessor" and "lessees," post, F. XXVIII., p. 438.*]

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Lease to Builders in accordance with Building Agreement.

Proviso that on adoption by parish covenant to repair road and sewer shall cease.

Proviso for re-entry.

Covenant by lessor for quiet enjoyment.

XXVIII.

XXVIII.

BUILDING LEASE OF LAND, forming part of a large estate, to a builder who covenants to build several houses of specified value, according to plans, and to lessor's satisfaction, etc., and to make roads and drains, and repair same; with power to lessor to do so in default. Exceptions of minerals and other rights. Rents varying. Additional rent if premises used for trade. Covenant to insure houses when roofed in and increase the amount when finished. Provisions for apportioning rent, etc.; and variation of same. With other suitable covenants and provisions as to manner of building, etc., etc.

Building Lease. Part of large Estate.

THIS INDRE, made, etc. WITNEETH [*insert testatum as in Precedent XXI.*], ALL THAT, ETC. [*Parcels, see F. XXVII., p. 430*]: TOGETHER with, etc. [*right of way over half of road, and other roads; and right of passage of water, etc. See F. XXVII., p. 430*]. EXCEPT AND RESERVING out of this demise all mines and minerals whatsoever, with liberty for the lessor to dig, search for, win, convert, and carry away the same on making reasonable compensation to the lessee for all damage or injury (if any) he may thereby sustain: n)

AND EXCEPT [*exception of rights restricting free use of adjoining land, as in Precedent, F. XXVII., p. 430*]:

AND EXCEPT and reserving unto the lessor, and the lessor and occupiers for the time being of any other bldg^s, land, or grounds hold of or belong to the lessor, full and free right of passage, etc. [*as in F. XXVII., p. 430*]:

but they are not usual in repairing leases, and of course the covenant would then be construed in a very different and modified manner.

(m) If there is to be any provision as to the bankruptcy, etc., of the lessees, state so here. It is, however, not reasonable in the case of houses where all the buildings have been completed.

(n) The lessor sometimes excepts and reserves such minerals only as may be within a fixed distance below the surface; and in some few cases, although such a term appears to be very unreasonable, the lessor stipulates that the support may be disturbed without any liability on his part. See *ante*, p. 329, as to the right of support, etc.

Parties.

Testatum.

Parcels.

Exception of minerals, etc.

—and free use of other lands;

—and right of way over intended road;

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Building
Lease.
Part of large
Estate.

—right of
passage of
water, etc.

Habendum.
Rents varying
in amount;
—last pay-
ment;
—proportionate part
in case of
re-entry.

Covenants
by lessee:
—to pay
rents, etc.;
—to fence off
premises;
—to commence
building;
—to build;
—according
to approved
plans;

Additional
rent if pre-
mises used
for trade.

Reddendum
if additional
houses are
built.

AND EXCEPT and always reserving unto the lessor, and the lessees and occupiers for the time being of any other bldgs, lands, or grounds held of or belonging to the lessor, the free passage of water and soil coming or to come off and from any other bldgs, lands, or grounds of the lessor, through the main sewer or drain as aforesaid, and through all channels, sewers, drains, and watercourses now belonging to, or which shall hereafter belong to, or which shall hereafter be made in, upon, through, or under, the said premises hereby demised: such lessees and occupiers for the time being paying their respective proportions (to be ascertained as herein provided) of cleansing and repairing the said channels, sewers, drains, and watercourses as often as need shall require:

To HAVE AND TO HOLD [*habendum as in F. XXVII., p. 430*]:

YIELDING AND PAYING therefor yearly during the first _____ years of the said term the yearly rent of £ _____, and yearly during the residue of the said term the yearly rent of £ _____, to be respaly paid quarterly on the _____ day of, etc. [*reddendum as in F. XXVII., p. 430*]. (o)

AND THE LESSEE hereby covenants, with intent to bind his assigns, with the lessor in manner following, that is to say, THAT the lessee, his executors, administrators, or assigns will [*pay rent and taxes, etc.*; see F. XXVII., p. 430]:

AND will also forthwith well and sufficiently fence off the said premises hereby demised from the adjoining property:

AND will within _____ after the execution of these presents commence and without intermission and with reasonable expedition proceed with the erection of houses, (p)

AND will at his own [the lessee's] expense erect and completely finish fit for habitation on or before the _____ day of _____ the [*give description*] houses in a workmanlike and substantial manner, and on such parts of the said demised premises as front [*insert description*] and are respaly coloured _____ in the said plan, and according to such plans (including the situation, pattern, and height of the fences), elevations, sections, condons, and specifications as shall be previously

(o) The following clause may, in some cases, be inserted, reserving an additional rent in case the demised premises should be used for trade (see *ante*, p. 234, as to penal rents):

“AND in case the lessee shall at any time during the said term use, or permit or suffer the said premises, or any part thereof, to be used for any art, trade, or business whatsoever, without the licence in writing of the said lessor for that purpose first had and obtained, then likewise yielding and paying, during such time as the said premises, or any part thereof, shall be so used (over and above the said yearly rent hereby reserved), unto the said lessor, the further yearly rent of £ _____, to be paid quarterly by equal portions, on the same quarter days and times in every year as are hereby mentd for payment of the said yearly rent hereby reserved, the first quarterly payment thereof to be made on such of the said quarterly days as shall next happen after all or any part of the said demised premises shall be so used as aforesaid.”

Form of reddendum if additional houses are built. In such a case as the above, the building lease will also provide for the class of house to be erected.

“Paying therefor, yearly, during the said term, the rent of £5, by two equal half-yearly payments, on the _____ day of _____ and the _____ day of _____: And also paying for each messuage which shall be built on the said premises (except the messuage hereby covenanted to be built) the additional yearly rent of £5, to be paid half-yearly on the days whereon the first-mentd rent is made payable, and to commence in respect of each additional messuage from the first of such half-yearly days of payment as shall next follow the roofing or covering in of such messuage.”

(p) If such is the case, add: [“of the same rate of building character and description in every respect as and in a uniform manner with the messuages or tenements ranging therewith in the same street”] or [“in one continued line or row”] or [“to be used as shops”]; in the latter case the covenant as to trades, etc., *infra*, will require modification.

approved of in writing by, and under the inspection and in all respects to the satisfaction of, the architect or surveyor for the time being of the lease, and will at the like expense, and subject to the same conditions, build proper and suitable outbuildings, walls, yards, gardens, drains, and other conveniences to such houses, reply, and in erecting and building the said houses and other works, the description, quantities, and authorities of materials to be used shall be subject to the inspection and approval of such architect or surveyor as aforesaid:

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Building Lease. Part of large Estate.

And will expend in erecting each of such houses and the offices and outbuildings in connection therewith the sum of £ (r) at least:

—to the satisfaction of lessor or architect, etc.

And will at all times produce and show to the lessor, or to his architect or surveyor for the time being, on demand, the bills and vouchers for the materials and labour used and employed in and about the said houses:

—will expend a certain sum: —and produce vouchers;

And will pay to the architect or surveyor of the lease for the time being on his approval in writing of the plans, elevations, and specifications of each of the said houses a fee of £ (s), and on his approval in writing of the completion of each of the said houses a fee of £ (t) [insert here any particular arrangement]:

—will pay architect's fees;

And will not during the said term erect or suffer to be erected any house or building any part of the said premises hereby demised, other than and except the houses, offices, outbuildings, and conveniences hereby covenanted to be erected [or, any house or building which shall be of less clear yearly letting value than £ (u)] or any fence, fence, or erection nearer to the external boundaries of the said premises than the billing line indicated on the said plan, without the previous licence in writing of the lessor, or his architect or surveyor for the time being:

—will not erect any other buildings within certain line;

And will at the like expense on or before the day of the said term make along the whole of the said parcel of ground, of good materials, and in a proper and workmanlike manner, to the satisfaction of the architect or surveyor of the lease for the time being, the roads of which the site and dimensions reply are delineated and described on the said plan and distinguished therein by the colour and marked: Together with proper footpaths on each side of the said roads reply ft in width, and each of the said roads including such footpaths shall be ft in width:

—will make new roads, etc.;

And will, at the like expense, with all convenient speed form and construct all main sewers, drains, channels, trench traps, gullyholes, and grids under each of the before-mentioned roads reply marked on the said plan, as the [or other competent authority for the time being of the district or parish, and to the lessor or his architect or surveyor for the time being may at any time require to be built and constructed for the drainage or sewage of the said parcel of ground hereby demised or any part thereof, or all or any of the erections and buildings therein:

—will construct sewers and drains, etc.;

And will, at the like expense, during so much of the said term as the said roads, pathway, sewers, and drains as aforesaid shall not be legally repairable as public roads or highways, sewers, and drains, repair (s) and maintain in a proper and substantial manner, to the satisfaction of the surveyor of the lease for the time being, the said roads, pathway, sewers, drains, and other works reply:

—and will repair roads, etc., until repairable as public roads;

And will, if the same shall at any time during the said term make default in forming, constructing, or repairing and maintaining as aforesaid, any such roads, pathway, main sewer, drain, channel, trench trap, gullyhole, and grids as aforesaid, permit the lessor and his surveyor or agent for the time being to enter upon the said premises with workmen or others, at any time after weeks' notice in writing shall have been given to the lessee, or left upon any part of the premises, to execute and do all such works as aforesaid in which default shall have been made by the lessee:

—that if lessee make default in forming roads, etc., lessor may after notice execute works;

And in case where it is provided that the houses shall be "of not less than the amount of clear yearly letting value of £ (v)";

And in case where it is provided that the houses shall be "of not less than the amount of clear yearly letting value of £ (v)";

XXVIII.

Building¹

Lease.

Part of large
Estate.

—and will
pay all such
expenses ;
—will pay
proportion of
expense of
roads, etc., used
in common
with adjoining
lands ;

—will not
make any
other roads
or permit
thoroughfare ;

—will not
obstruct
lights ;

—to insure
houses when
roofed ;

—and increase
amount when
finished ;

—and produce
receipts ;

—to reinstate
buildings,
and make up
deficiency ;

—in default
lessor may
insure ;

—not to
alter plan or
elevation ;

—not to
make bricks ;
—nor dig for
gravel, etc. ;

—not to
carry on
trades, etc. ;

—not to do
anything that
may be a
nuisance, etc. ;

—that work-
men may
enter to repair,
etc., adjoining
houses, etc.

AND will pay to the lessor on demand all costs and expenses sustained by him in or about the exon and doing such works as alsd or incidental thrtto :

AND ALSO, etc. [*Covenant to repair*, F. XXVII., p. 431.] And will also in particular paint, etc. [*paint outside and inside*, F. XXVII., p. 431.]

AND ALSO will from time to time pay and allow a reasonable proportion towards the expenses of making, supporting, and repairing all ways, roads, pavements, party walls, or party fence walls, or fences, gutters, drains, sewers, pipes, and watercourses belongg, or which at any time shall belong, to the premes hrby demised, or which shall be used for the convenience of the same, or any part throf, in common with any lands or bldings near or adjoining thrtto, or which shall be reasonably required by the architect or surveyor for the time being of the lessor to be made or formed for the purpose of being so used, and towards the expenses of cleansing such gutters, drains, sewers, pipes, and watercourses, such proportion to be ascertained by the sd architect or surveyor, unless and until such expense shall be defrayed by or out of rates to be levied for that purpose, which rates the lessee will be liable to pay under the covt in that behalf hrnbfre contd :

AND ALSO that the lessee will not at any time or times during the sd term make or form any road or pathway, or permit any road, way, or thoroughfare to be made or used, over or through any part of the sd premes hrby demised, except such roads as hrnbfre mentd and marked in the sd plan :

AND SHALL not, by blding or otherwise, rtop or obstruct any light or lights belonging to any messe or tenement, the estate or interest whereof in posson or in reversion is in the lessor :

AND ALSO [*to insure*, F. XXVII., p. 431], and during the sd term keep insured, each of the sd houses and every blding which may hrar be built on the sd land hrby demised, or any part throf, and effect the same within six days after each such blding shall be reeefed or covered in, or within six days after such earlier period at which the sd lessee shall be required by the lessor or his architect or agent for the time being so to do, in any sum or sums of money as shall be equal to parts at least of the actual value throf respdy ; and will increase the amnt of such insurances respdy when and as each such house or building shall be completed, so as to make the sum insured thereon equal to [three fourth] parts at least of the then full value throf, such value to be ascertained by the architect or surveyor of the lessor for the time being :

[*Covenant to produce receipts* F. XXVII., p. 431, *reinstate buildings burnt down or damaged, and to make up deficiency*. *Covenant by lessee that in default lessor may insure*, F. XXVII., p. 432]: AND such rebuilding or making good such damage shall be made and done under the direction of the lessor :

AND [*Covt not to alter plan, etc.*, F. XXVII., p. 432]:

AND will not make or suffer to be made on the said premes any bricks, (s) tiles, or other wares, nor dig for or carry away any gravel, clay, marl, brick earth, sand, or other substance from any part of the sd premes, or make any excavations thron, except such as may be necessary for laying the foundations of the sd houses and bldings hrnbfre covtd to be erected, as may be approved of by the architect or surveyor of the lessor for the time being :

AND will not, without the previous licence in writing of the lessor, carry on, or suffer to be exercised or carried on, upon any part of the sd premes any trade or business whatsoever, or allow any building to be erected thereon to be used as a hospital, or as an establishment for lunatics, or school or lodging house, (t) but will keep and use the same as private [or professional] dwg-hses only :

AND [*Covt not to suffer nuisance, etc.*, F. XXVII. p. 432]:

AND further that it shall be lawful for the workmen of the lessor, or of his

(s) See *Robinson v. Milne*, 53 L. J., Ch. 1070.

(t) See the decisions as to this clause, p. 228, *et seq.*

tenants or occupiers of houses adjoining or near, or which may during the term adjoin or be near, to the said premises hereby demised (such tenants and occupiers previously obtaining the consent in writing for that purpose of the surveyor for the time being of the lessor), at all reasonable times of the day, to enter into and upon the said demised premises and the messes and buildings to be erected as aforesaid for the purpose of cleansing drains and for repairing any of the adjoining houses as often as occasion shall require, without interruption by the lessee, such lessor, tenants, or occupiers doing as little damage as may be, and making good all damage and injury occasioned thereby:

AND ALSO, etc. [*Covenant that lessor may enter to view state of repairs; and take inventory; and leave notice to repair, etc.* See F. XXVII., p. 432.]

AND that in case the said premises, or any part thereof, shall be assigned [or underlet for all or any part of the term hereby granted], (u) every or any assignment [or underlease (u)] to be so made shall, within 3 calendar months after the expiry of the same, be left for not less than 7 days at the office of the lessor for the time being of the lessor, to the intent that the same may be there registered, such registration to be at the expense of the said lessee, which shall not exceed the sum of £ for every such assignment [or underlease (u)].

AND [*Covenant to deliver up premises*, F. XXVII., p. 432]. [*Power to re-enter*, see *ib.*, p. 433.]

PROVIDED ALSO (x) that if the lessee shall, at any time or times during the term hereby granted, underlet (y) or assign any one or more of the messes and buildings so to be erected as aforesaid, the lessor will at the request and expense of the lessee join in any such underlease or assignment for the purpose of apportioning the yearly rents hereby reserved, and in every such case the architect or agent for the time being of the lessor shall determine what proportion of the rents hereby reserved shall thenceforth be payable in respect of the premises comprised in such underlease or assignment, and a memo of such apportionment, signed by the lessor or the said architect or agent, shall be endorsed on these presents, and the counterpart thereof, and other document under which the apportioned rents shall be payable: and for the purpose of covenanting and declaring that from and after the endorsement of such memo each such undertenant or assignee, his or their executors, administrators, and assigns, shall hold the premises comprised in such underlease or assignment subject only to the payment of the apportioned rents so to be made payable in respect thereof as aforesaid, and to the observance and performance of the covenants and conditions herein contained on the part of the lessee to be observed and performed so far as the same shall be applicable to the last-mentioned premises in the same manner as if a separate lease of the same premises had been granted to him, her, or them at and under such last-mentioned apportioned rents, covenants, and conditions, so far as the same shall be applicable as aforesaid respectively:

AND it is hereby agreed and declared that no apportioned rent shall in any case be less than the sum of £ or exceed £ of the rack-rent value of the land in respect whereof the same shall be apportioned, and the buildings erected or to be erected thereon when finished and fit for habitation.

AND that the lessee shall not be entitled to apportionment until all the said messes and buildings hereby covenanted to be erected shall be completed and rendered fit for habitation as aforesaid, and only in respect of such of the said messes and buildings as shall be so completed and rendered fit for habitation in pursuance of these presents:

PROVIDED ALWAYS that each such underlease or assignment shall contain and reserve unto the lessor a proviso for re-entry similar to that hereby contained, so far as regards the rents and covenants subject to which each such underlease or assignment

XXVIII.

Building
Lease
Part of large
Estate.

Notice to
be given of
assignment,
etc.;

—to deliver
up premises.

Power to
re-enter.
Apportion-
ment of
rent, etc.;

—and of
covenants.

Apportion-
ment not to
be less than
fixed sum, etc.;

—not to be
made until
houses are
finished;

—fresh power
of re-entry to
be reserved.

(u) If notice of underlease is to be given, insert the words in brackets. See note (y), *infra*. See also, F. XXVII., for covenant not to assign.

(x) See also, Chap. XVII., as to apportionment of rent, and the provisions of the Conveyancing and Law of Property Act, 1881.

(y) Omit reference to underlease throughout if the lease is not to be permitted to underlet. See note (u), *supra*.

XXVIII.
Building
Lease.
Part of large
Estate.

Covenant by
 lessor for quiet
 enjoyment.

Operation of
 words "lessor"
 and "lessee."

will hold the premes so to be underlet or assigned as afsd : (z) [*Covenants by lessor for quiet enjoyment*, F. XXVII., p. 433 (a)]:

AND IT IS HERBY LASTLY AGRD AND DECLARED that the hrs and assns (b) of the lessor, and the exors, admors, and assns of the lessee shall be bound by and entitled to the benefit of these presents and the covts and condons hrin contd in like manner as if they had been resply named hrin next after the words "lessor" and "lessee" resply throughout, as far as the same will admit, unless the context or the nature of the case may require a different construction.

IN WITNESS, ETC.

XXIX.

Building
Lease under a
Power.

BUILDING LEASE under a power. *Covenants by lessee to build certain houses in uniform manner with others; and also to build houses or other buildings, and expend a fixed sum on another part of land, according to plans, etc. to be previously approved of by lessor or reversioner; not to carry on particular trades; to pay proportion of expenses of roads and party walls, etc. Covenants by lessee that lessor may build against the walls of the houses to be erected which are to be party walls, and that lessor or*

(z) See note (x), p. 437.

Apportion-
 ment of rent,

"AND the lessor doth hrby covenant with the lessee that, in case the lessee shall at any time or times during the term hrby granted, underlet (*) or assign any messe or tenement, messes or tenements, or other erections and bldings, so to be erected or built upon the piece or parcel of ground hrby demised, or any part or parts throf, then, and in such case, he the lessor will at any time or times after the sd messe or tenement, messes or tenements, or erections or bldings, which shall be so underlet or assigned, shall be completely finished and made fit for habitation, at the request, costs, and charges of the lessee, join and concur in any such underlease or assumt, or underleases or assumts, so to be made as afsd, for the ppose of apportioning the yearly rent hrby reserved, and determining the proportion which each such undertenant or assignee, and the premes so underlet or assigned to him, shall be thenceforth subject to or liable to pay (such proportion of the rent to be ascertained by the architect or surveyor for the time being of the lessor), and for the ppose of exonerating the same, and each such undertenant or assignee of the premes so to be underlet or assigned to him, of and from the remaining part of the yearly rent of £ hrby reserved and made payable; but so and in such manner that the lessor shall not thrby release, prejudice, or affect the sd remaining part of the same rent in respect to the remaining parts of the hrby demised premes: And also for the purpose of covting and declaring that such undertenant or assignee, and the premes so to be underlet or assigned to him, shall be thenceforth subject to the covts, provisos, and agrmts hrnbfre contd, so far only as such covts, provisos, and agrmts shall be resply applicable to or shall concern the premes which shall be so underlet or assigned as afsd: PROVIDED ALWAYS that each such underlease and assumt shall contain and reserve unto the lessor a proviso for re-entry similar to that hrnbfre contd, so far as regards the rent and covts to which such underlessee or assignee, or the premes so to be underlet or assigned, is or are to be or continue liable as afsd."

(a) See F. XIX., p. 409 note (t), for covenants by lessor to build on adjoining land only in specified manner, and to take covenants from all other lessees with respect to repair of roads, etc.

(b) If the lessor be seised in fee; but if possessed of a term only, then "his executors, administrators, and assigns."

* See note (y), p. 437.

reversioner shall have full liberty of water-course, &c.; and other suitable covenants as to mode of building. Form of rent-charges where an additional rent is to be paid for building on other parts of land demised. Provision as to lesser taking main streets and sewers, &c.

XXIX.

Building Lease under a Power.

THIS INDRE, made the _____ day of _____, 18____, Betwix A. B., of, &c., [Name of leasing power, (herein called "the Lessor"), of the one part, and C. D., of, &c., (herein called "the Lessee"), of the other part [State full nature of settlement, of the second form below is used]. Now THIS INDRE WITNEETH That, in conson, &c. Testatum. [— F. XXVIII., p. 430].

He, the Lessor, (c) hath by these presents demise and lease unto the said Lessee, A.B., &c. [Parcels, see F. XXVII., p. 430], [Exception of minerals, see F. XXVIII., p. 430], [Reservation of passage of soil and water, see F. XXVII., p. 430].

Consideration. Demise.

To HAVE AND TO HOLD, &c. [see *ib.*, p. 430].

YIELDING AND PAYING, &c. (d) [see *ib.*, p. 430].

(a) Insert one of the following:

"In pursuance, and in exercise and exon, of the power or authority in the Lessor Where the given or received by a certain indre of settlement, dated the _____ day of _____ of power has and made between, &c., and of every or any other power or authority not been enabling him in this behalf, hath limit and appoint by way of demise or recited, &c."

"In pursuance, and in exercise and exon, of the power or authority to the Lessor Where the given or received by the said lessee in part recited indre of settlement, and of every or any other power or authority enabling him in this behalf, hath, &c." previously recited. [as above].

If under the Settled Land Acts—

"In exercise and execution of the powers vested in him under or by virtue of Under Settled the Settled Land Acts, 1882 to 1890, and of all other powers and authorities in Land Acts, any way enabling him in this behalf, hereby demises, &c.

(b) The following is a form of rent-charges to a tenant for life, and reversioner for the term being, where a certain rent is to be paid for lands to be built on, and a fixed rent for other land, subject to increase on such land being used for building; the lease being made under power.

"YIELDING AND PAYING thereof unto the said [tenant for life] and his heirs, Certain rent during so long of the said term as he shall live, and after his decease to the person or persons who for the time being shall be entitled to the reversion or inheritance of the said land, premises, &c. yearly rent of £ _____, being at the rate of £ _____ per acre for the fixed rent if the first or parcels of land first hereunto demised, containing respectively _____ and _____, fixed rent which are intended to be built on by the Lessee; and of £ _____ per acre for the other land at other land at _____, and _____, and _____, and _____, used for building purposes, which are not intended to be built on at present, but are intended to be used as _____; and in case the last-mentioned parcels or parcels of land, or either of them, or any part of the same, &c., shall, at any time here or during the said term, be built on by the Lessee, his executors, administrators, or assigns, or be used for any other purpose than as _____, Then yielding and paying as aforesaid the additional yearly rent of £ _____, being at the rate of £ _____ more per acre for the said last-mentioned parcels or parcels of land, which shall then and forth continue payable during the residue of the said term; such yearly rents to be paid by four equal quarterly payments on the _____, &c., &c., free from all, &c.; the first quarterly payment of the said rent of £ _____ to be made on the _____ day of _____; and the first quarterly payment of the said additional rent of £ _____ to be made on the first of the said quarter days which shall happen after the said parcels of land fully above-mentioned, or either of them, or any part of the same, &c., shall be built on or used for any other purpose than as _____."

XXIX.

Building
Lease under a
Power.Covenants
by lessee:—to pay share
of expense of
party walls,
roads, sewers,
and drains,
etc.;—that lessors
may build
against walls
of houses to
be built;
such walls to
be deemed
party walls.
Notice of
assignments,
—not to carry
on certain
specified
trades;—not to make
bricks or dig
for gravel, etc.;—not to alter
buildings, etc.;—lessor to
have free
liberty of
watercourse,
etc.

AND YIELDING AND PAYING [*proportionate part in case of re-entry, see ib., p. 430*]. AND THE LESSEE hereby covenants (with intent to bind his assigns) with the lessor, and as a separate covenant to and with the other person or persons who for the time being shall be entitled to the immediate reversion or remainder of or in the sd premises expectant on the sd term and his and their heirs and assigns (e) in manner following, that is to say,

THAT he the lessee, his exors, admors, or assns [*Covenant to pay rates and taxes, etc., see F. XXVII., p. 430*]. AND will [*Covenant to build, etc., see p. 431*]. [*Covenant to produce vouchers, p. 440.*] [*Covenant to pay architect's fees, p. 435.*] [*Covenant not to erect other than specified buildings, p. 432.*] [*Covenant to make roads and drains, see p. 435.*] [*Covenant to repair, see p. 431.*] [*Covenants to paint outside and inside wood and iron work, see p. 431.*] [*Covenant to yield up in repair at end of term, see p. 432.*]

AND ALSO will, during the sd term, as often as need shall require, bear, pay, and allow, a reasonable share and pportion of the expenses of making, supporting, repairing, and amending all roads, pathways, party walls, party gutters, common sewers, public sewers, pipes, watercourses, drains, and easements, which belong to or are used by, or which at any time during the sd term shall belong to the sd premises, or any part throf, or be used by the tenant or occupier or tenants or occupiers throf for the time being, and the owners or occupiers of any other messes or tenements, erections, or bldings, adjoining or near thрто, and that such proportion shall be ascertained by the sd architect or surveyor.

AND ALSO shall permit the lessor and his lessees or tenants to build against the pine-end walls of the messes, tenements, or bldings hrlly covtd to be erected, or of any other messe or blding which may be erected, on the sd premises, such walls being on the boundary of the sd premises, and that such walls shall thenceforth be deemed to be party walls:

AND that it shall be lawful for the lessor, etc. [*Power to lessor or reversioner to enter to see condition of premises; and leave notice; lessee to repair according to notice. See F. XXVII., p. 432.*] [*Covenant to give notice of assignments or underleases, see F. XXVIII., p. 437*]:

AND ALSO (f) shall not, during the continuation of the sd term, convert or use the sd piece or parcel of ground, or any part throf, or the dwg-hses, or any bldings to be erected thron, into or as a place of public resort or amusement, or carry on in and upon the sd premises, or any part throf, or permit or suffer the same or any part throf to be occupied by any pson or psons who shall use, exercise, or carry on thrin, the trade or business of a soapboiler, pewterer, bellfounder, blacksmith, whitesmith, whitelead-maker, dyer, tinman, fellmonger, currier, trunkmaker, coppersmith, plumber, glazier, ivory-turner, lampblack-burner, or any other trade or business whatsoever, without the previous licence in writing of the lessor, which may be or grow, nor, etc. [*Covenant not to permit nuisance, F. XXVII., p. 432.*] [*Covenants not to make bricks; not to dig for or carry away gravel, etc., except for building, see p. 436.*] [*Covenant not to cut or main principal timbers nor alter elevation, etc., p. 436*]:

AND FURTHER, ETC. [*insert covenant to insure buildings when roofed in, and increase amount when completed; to produce receipts; and to apply insurance money towards repairs of damage by fire, and make up deficiency*].

AND ALSO that the lessor, and his tenants, shall have free liberty of watercourse in and through the premises hrlly demised from any adjoining premises or other estates belongg to the lessor by means of the sewers, drains, or channels there, or hrafter to be made, to carry off the water and soil from the other houses near or adjoining thрто; the pson or psons forming or using any such watercourses making good all damage occasioned thrlby, and contributing to the expense of keeping in repair and cleansing the same.

(e) See now the provisions of ss. 10 and 11 of the Conveyancing Act, 1881, *ante*, pp. 255, 256.

(f) If any other trades, except those specified and the like, are to be permitted, this covenant, with slight alterations applicable to the particular case, may be inserted, but if one or two specified trades only are to be permitted, it will, of course, be advisable merely to state the same. See the covenant, F. XXVIII., p. 436, note (t).

[Covenant to permit lessor and tenants of adjoining houses to enter to repair party walls and drains, etc., see F. XXVIII., p. 436]:

XXIX.

PROVIDED ALWAYS [Proviso for re-entry on non-payment of rent, etc., see p. 437].

Building
Lease under a
Power.

AND, ETC. [Covenant by lessor for lessee's quiet enjoyment, see F. XXVII., p. 433, substituting the words "the said A. B." for "the lessor." (q)]

Adjoining
tenants, etc.,
may enter to
repair, etc.
Operation of
words "lessor"
and "lessee"

AND IT IS HERBY LASTLY AGREED and declared that the word "lessor" shall include all such person or persons who shall from time to time be entitled to the reversion of the premises hereby demised expectant on the term hereby granted where the context admits, and the word "lessee" shall include the exors, admors, and assigns of the said , and all such persons and each of them shall be bound by and entitled to the benefit of these presents, and the covenants and conditions herein contained, in like manner as if they had been respectively named herein next after the words "lessor" and "lessee" respectively throughout, so far as the same will admit, and unless the context or the nature of the case may require a different construction.

[Provisions as to apportionment of rent, see F. XXVIII., p. 437.]

Apportion-
ment of rent.

IN WITNESS, ETC.

XXX.

ADDITIONAL and alternative clauses for building leases.

XXX.

Additional
Clauses for
Building
Leases.

(a) AND will build the cellars and all other stories of the said messes and houses and shops respy, of such heights, and will carry out all other work in such a manner in all respects, as to be in accordance with the provisions of "The Metropolis Management Acts, 1855 to 1890," and "The London Building Act, 1894," and all modifications or byelaws thereof for the time being subsisting; (h)

To build ac-
cording to the
provisions of
the Metropolis
Management
and London
Building Acts;
—to build
brickwork,
etc., of certain
thickness;

(b) AND will build the fore fronts and back fronts to the said messes and houses and shops respy to the top of the cellar floor, with [state number] bricks in thickness, the first and second stories with bricks in thickness, the third story with bricks in thickness, and the garret with bricks in thickness; and the partition walls between houses and house with bricks in thickness at the least to the top of the cellar stories, and from thence to the garret floor with bricks in thickness at the least, and above the garret floor with bricks in thickness; And will in the brickwork in the fore fronts use hard stock bricks faced with good main stocks of uniform colour, and will work a fascia, at every story of each house in the front, with O. G. at the foot of it; And all other bricks used in erecting the said messes or houses and shops shall be [specify particular bricks, if any, for back] and good and sufficient well-burnt bricks, and the mortar well wrought and tempered, and made of good and fresh lime mixed with river sand (i) in the proportion of bushels of lime to bushels of sand, and will erect a balcony of wood or iron to the back of each of the said messes or dwellings first hereinbefore particularly mentid, which shall project not more nor less than 3½ ft beyond the upright of the said house, with cantilever cornice all along the said front to Street, according to, etc., and to the satisfaction of the said architect;

(c) AND will not make use of any bricks, stone, timber, or other materials, but such as shall be in all respects sound and good and new and well seasoned, and also submitted to and approved of by the said architect;

—materials to
be approved
by architect;

(d) AND will build each of the said dwellings and shops respy in a uniform manner, so as to be in a line with the other dwellings or shops respy intended

—to build the
houses in a
line with
other houses;

(g) This will avoid any question as to whether the covenant renders the lessor liable for the acts of the remainderman.

(A) See another clause, F. XX., Cl. 10, p. 413.

(i) As to the composition of mortar which must be used within the county of London, see *post*, p. 613, and cases there cited.

XXX.

Additional
Clauses for
Building
Leases.

—to lay out
gardens;

—to make
common
sewer;

—buildings to
be faced so as
to increase
light to
adjoining
property.

—to make
drains into
the sewer;

—to level and
pave road to
middle and
pathway;

—to set up
posts;

—to complete
houses within
fixed time;

—not to build
on certain
part of land;

Proviso for
entry only
into that part
where default
is made.

to be built on the sd pieces or parcels of ground resply coloured and on the sd plan, so that the windows of every story of the sd dwg-hses and shops resply shall be in a line with the windows of the several dwg-hses or shops intended to be built as afsd:

(c) AND ALSO will lay out the parts of the sd parcel of ground, first hmbfre parlarly desed on the side of the sd dwg-hses, to be erected as hmbfre covtd, and delineated on the sd plan, as and for gardens thro, and will inclose the same with walls ft in height, and the brickwork throf shall not be less than in thickness:

(f) AND ALSO shall and will make a common sewer down and along the middle of the road marked and coloured in the sd plan, and such sewer shall be ft in circumference, and shall be built with good bricks, and with such declivities and falls, and with such stench traps, gully-holes, and grids, and upon and according to such plans and systems as the or other competent public authority (k) for the time being of the district or parish, and the sd architect, may at any time require to be built and constructed for the drainage or sewerage of each of the sd parcels of ground hrby demised, or any part throf, or all or any of the erections or bldings thron:

(g) AND ALSO shall provide that each and every building to be erected as aforesaid shall be faced on the side fronting towards with white glazed bricks or tiles, or with stucco or cement painted white or a light stone colour:

(h) AND ALSO will, subject to the like requirements and to the satisfaction of the sd architect, make drains from the sd dwg-hses and shops resply into the sd sewer:

(i) AND ALSO will to the satisfaction of the sd architect level and pave the sd road as far as to the middle of the same, and will pave along the sd ground ft in depth from the upright of the sd walls of the sd dwg-hses and shops resply, with Parbeck and Swindon stone, descending one inch at least from the wall:

(j) AND set up oaken posts of 7 ins sq, and $3\frac{1}{2}$ ft above the ground, 12 ft each from the other, all along before the sd ground in the street, at ft distance from the upright of the sd wall:

(k) AND that all and every of the sd dwg-hses and shops and other bldings shall be well and properly glazed, slated, and plastered, and in all things completely finished as to brick, carpenters', plasterers', smiths', glaziers', plumbers', painters', and other work whatever, and make fit for habiton, subject to such inspection and approban as afsd, on or before the day of:

(l) AND WILL not erect, build, or set up, or permit to be erected, built, or set up, on any part or parts of the piece of land in the sd plan coloured, any messe, edifice, erection, or blding of any class, character, or description whatsoever, but shall at all times during the sd term maintain and keep, or cause to be maintained and kept, that part of the sd premes, which in the sd map or plan is coloured, in its present open state and condition.

(m) The following proviso for lessor's re-entry into that part only in respect of which the lessee shall make default in performance of the covenants, etc., may be inserted where distinct rents are reserved:

"PROVIDED ALWAYS, and it is hrby expressly agrd, that if the sd several rents hrby reserved, or any part throf resply shall be unpaid by the space of days after any of the days on which the same ought to have been pd (although no formal demand shall have been made throf), or in case of the breach, or non-perfice, or non-observe of all or any one or more of the covts and agrmts hrin contd on the part of the sd [lessee], his exors, admors, or assns, then, and in any or either of the sd cases, it shall be lawful for the sd [lessor], (l) his hrs or assns, to re-enter into or upon that part, or those resptive parts, only of the sd premes hrby demised, in respect of which there shall have been such non-paymt, non-perfice, non-observe, or default; it being the true intent and meaning of these

(k) See another form, F. XXIX., p. 440.

(l) Insert the words "lessor, his heirs and assigns, and also the [mortyagor] his heirs and assigns," if the lease is by mortgagor and mortgagee.

provide that the right of re-entry of the lessor, his heirs or assigns, under this present provision, shall not extend or be applicable to any part or parts of the premises hereby demised in respect whereof the rent, covenants, and agreements shall have been duly paid, performed, and observed."

XXX.
—
Additional
Clauses for
Building
Leases.

XXXI.

BUILDING UNDERLEASE where an ornamental garden, &c., is to be used in common with houses adjoining, and building has been common. Suitable for one or several houses. Covenants by lease to build in uniform manner with other houses, according to a plan, within fixed time, &c.; to use certain materials, &c.; also to build a wall, which is to be a party wall, and to pay carriage-way and foot-way, make drains, contribute towards the expense of maintaining roads, &c., and ornamental garden and lawn-tennis ground; to paint, &c., in a mode prescribed and to preserve uniformity; to comply with regulations with respect to ornamental garden, &c.; to observe covenants of original lease. Other covenants as to mode of building. Covenants by lease to indemnify lessor from the original rent, and to produce original lease and furnishings, &c. Variation authorising lease to reimburse lessor if any manes he may have to pay on account of original rent. (a)

XXXI.
—
Building
Underlease
with use of
Ornamental
Garden, &c.

THIS INDRE made, etc.: WITHAS (n) [recite lease and agreement for underlease]: PARTIS.

Partis.
—
Recitation.
Description
of the
Parcels.

NOW THIS INDRE WITNEITH, ETC. (o), the lessor (p)
Doth hereby demise unto the lessee All, etc. [parcels], being part of the plot of ground herebefore mortd:

TOGE with the use, for the benefit and advantage, as hereinafter, of the inhabitants or occupiers for the time being of the said piece of ground hereby demised and the house to be erected thereon, in common with the respective inhabitants or occupiers for the time being of the other messuages or dwell-houses erected or to be erected on the land adjoining or contiguous to the said piece of land hereby demised, of the piece of ground in front thereof, abutting, &c. [insert details]; and which said wholly benefitted piece of ground is, or is intended to be, included and held out partly as a footway and carriage drive or access, and partly as an ornamental garden, and lawn-tennis ground, to be used and enjoyed during the term hereby granted in common by the respective inhabitants or occupiers for the time being of the said other messuages or dwell-houses erected or to be erected hereon:

With use of
foot and
carriage way,
ornamental
garden, and
lawn-tennis
ground;

—in common
with other
houses.

EXCEPT and always reserving unto the lessor, and the respective tenants or occupiers for the time being of the other messuages or dwell-houses abutting, or which shall at when erected as aforesaid, upon the footway and carriageway or access, and ornamental garden aforesaid, and all parcels, with or without houses and carriages,

Exceptions
and reserva-
tions of right
of way;

(a) For a form of lease for the use of part of property held under original lease, with covenant for renewal, and power to erect new buildings in erecting new buildings and improving existing buildings; see *Form of Lease, and Power of Renewal, and Power of Improvement of Premises*, Vol. VII., p. 100.

(o) The recital may be, and is frequently, omitted if the original lease is not a party, as in this present case.

(p) If a premium be paid (in which case see the Stamp Act, 1861), the following will be inserted:

"And in witness whereof the said lessor, at and by the execution of these presents, and by the lessor to the lessor as and by way of premium, the receipt whereof is hereby acknowledged."

(p) If the ground land be made a party, add as follows:

"With the lessee in writing of the said [ground land] mortd by his executing these presents."

XXXI.

Building Underlease with use of Ornamental Garden, etc.

—and passage of water and soil.

Habendum.

Covenants by lessee :

—to build according to a plan in all respects, and to use certain materials ;

—to build walls ;

—which is to be a party wall ;

—to make carriageway and footway ;

—that trimmers shall be of freestone ;

—chimneys and flues ;

—vaults in front area, etc., shall be finished as soon as house is covered in ;

going to and returning from the sd last-mentd messes or dwg-hses, or any or either of them, full and free liberty of ingress, egress, and regress, way and passage, at all times during the sd term hrby granted, to pass and repass along the Road in front of the sd premes hrby demised :

ANN ALSO except and always reserving unto the lessor, and the sd [*original lessor*], his hrs and assns, and the tenants and occupiers for the time being of any other messes, lands, or grounds of or belonging to him or them, the free passage or running of water and soil, etc. (*ante*, F. XXVII., p. 430) ; To HAVE AND TO HOLD, ETC. : (*q*)

YIELDING AND PAYING, ETC. [*Reddendum*, F. XXVII., p. 430, and *proportionate part in case of re-entry, ib.*] ;

AND THE LESSEE hereby covenants (with intent to bind his assigns) with the lessor [*Covenant to pay rent, rates, and taxes*, see F. XXVII., p. 430 ; *to cover in and finish the house by certain time to the satisfaction of lessor, etc., ante*, p. 431] :

AND ALSO that the sd messe or tenement and bldings, with respect to the sitnon throf, the range of line, number of ft in front, the length and depth not exceeding ft, the form and elevation in front, the windows and doors, order of work, the cornices, bldings, and ornaments in front, and in all other respects, shall be built agreeably and conformably to the plan, and the elevation in the sd plan, resply this day signed by the parties herto, and deposited with , and to the explanations and references thron ; and shall build the sd front of such house with [*insert particulars as to back of house*], and cover the roof throf with , and good freestone or casestone, and affix good leaden gutters, not less than 6 pounds of lead to every suppl sq ft ; and shall affix in a uniform mnner a circular leaden rainwater pipe, with a neat head, if thruuto required by the architect, to convey the rainwater from the roof of such house ; and shall and will point the external faces of all the rough stone walls with proper pointings :

AND shall, to the satisfaction of the architect, at the like costs and charges, erect and build, or cause to be erected and built, a substantial wall at the end of the premes hrby demised, of at least ins thick, which is hrby declared to be a party wall (*r*) between tne messe hrby demised and the messe now being erected by ;

AND shall as soon as conveniently may be, at the like costs and charges, and to the satisfaction of the architect, make and form the carriageway in front of the sd premes, and pave a footway of the breadth of 10 ft, in a line with the area of the sd house and blding, with proper steps and landing-places, with the best faced stone, in a workmanlike manner, and edge the same footway with fine edging of the same sort of stone, of a proper depth, and separate the footway from the said area by a neat iron railing ; and that such railing shall range in a straight line, and parallel with the front of such house and building, in a uniform manner with, and shall be of the same design as, the railing used or to be used in the constron of the other houses adjoining or intended to be erected, and shall be fixed with the best kind of hard freestone, curb, or casestone, not less than 3 ins thick, which curb or casestone shall not exceed 5 ins in height from the sd footway ;

AND ALSO that the ends of all trimmers and woodwork used in and about the sd blding, bearing in any chimney-stack, shall in all instances be let into solid freestone, so as not to pass through the same ; (*s*) and that all chimneys and flues that shall or may be made in the sd messe or bldings, intended to be erected and built on the plot of ground hrby demised, shall be carried up the main walls of the sd messe or bldings to the top of the same ;

AND ALSO that, when and immedly after the house to be built on the plot of ground hrby demised shall be covered in, the vaults in front of such house shall

(*q*) If the original term is stated, insert the words "except the last days thereof."

(*r*) This is, of course, subject to the terms of the lease with the original lessor.

(*s*) But see the provisions of the London Building Act, *post*, Part III., as to the Metropolis.

be immediately turned, the area made, and the said footway and street before the said building completely pitched, paved, and finished, with all possible expedition;

AND ALSO that, in case the said pitching and paving and other work herebefore covenanted to be done before the front of the said house shall not be complete and finished within 6 mos next after the other house adjoining thereto, now being erected by _____, shall be covered in, it shall be lawful for the lessor to pitch and pave, and do all such other work before the house hereby demised as may be necessary in order to completely finish the footway and street; and that he the lessor shall and will forthwith repay to the lessor all costs, and charges, that may be incurred thereby;

AND ALSO shall, to the satisfaction of the said architect, at the like expense, make and construct good and sufficient drains from the front of the said house and offices, and leading from the same offices and buildings to the main sewer, which drains shall be made of _____, not less than _____ ins by _____ ins in the clear, and shall keep the same drains in repair [Covenant to repair, see F. XXVII., p. 431]:

AND ALSO shall contribute and pay to the lessor such a reasonable and rateable proportion of the charges and expense of forming, making, and maintaining the several roads [describe roads], and also of making, supporting, repairing, amending, cleansing, and keeping in good and proper order and condition the footway and carriageway or access, and ornamental garden and lawn-tennis ground hereby demised, and all the walls, iron, and other posts, rails, gates, and fences with which the same are or shall be inclosed, and of painting the iron and other posts, rails, gates, and fences with which the same are or shall be inclosed, as shall from time to time be required by the lessor, such proportion to be ascertained from time to time by the lessor, or the architect:

AND ALSO shall bear, pay, and discharge a reasonable and rateable share of the costs and charges of supporting, repairing, amending, and cleansing the said carriageway and footway in front of the said premises (such proportion to be ascertained as aforesaid), as well all party walls and gutters of or belonging, or which shall at any time hereafter belong, to the said premises hereby demised, or any part thereof, as also all drains, and common or public sewers, and other easements, into or through which any water or soil shall come or run from the said premises hereby demised, or any part thereof, or which shall be used by him, the lessee, in common with the owners and occupiers of any adjoining premises:

AND ALSO shall from time to time, and at all times during the said term hereby granted, comply with such reasonable regulations and restrictions with respect to the use and enjoyment, by the respective inhabitants of the aforesaid messes or dwelling-houses abutting thereon, of the said footway and carriage drive or access, and ornamental garden-ground, as shall from time to time be established and required by [state here "the lessor, etc.," or "the committee, etc.," as the case may be]:

AND [Covenant not to assign without licence, etc.] (1): AND, ETC. [Covenant to insure and produce receipts, and that in default lessor may insure and recover expenses from lessee; see p. 432]: AND, ETC. [Monies recovered to be laid out in restoring premises, and lessee to make up deficiency; see F. XXVIII. p. 436.]:

AND ALSO shall paint, or cause to be painted, in a good and workmanlike manner, all the outside wood and ironwork of the said messes or dwelling-houses, buildings, and premises so to be erected, and recolour and repaint in imitation of Bath stone all the outside stucco-work, and clean and scour the outside stonework, in the month of _____ in every succeeding [fourth] year of the said term hereby granted, and not at any other time or times during the said term save and except only so far as may be necessary from time to time towards remedying the said premises, or such part thereof as may happen to be damaged or destroyed by or by means of fire, or other inevitable accident, and also all the inside work once in every [eighth] year during the same term twice over, with good and proper oil colours; and all such outside painting to be from time to time made and done of such colour and in such manner as the lessor and the said architect shall direct or appoint:

XXXI.

Building Underlease with use of Ornamental Garden, etc.

—that if paving, etc., shall not be completed, etc., lessor may do it, and shall be repaid by lessee;

—to make drains;

—to repair:

—and contribute proportion of expense of making roads, etc.;

—of repairing foot and carriage way and ornamental garden, etc.

—and proportion of expense of repairing road, etc., in front of house, party walls, etc.;

—and drains, etc.;

—to comply with regulations respecting foot and carriage way and ornamental garden, etc.;

—not to assign or underlet;

—to insure and produce receipts, in default lessor may, etc.;

—to expend insurance monies and make up deficiency;

—to paint outside and to recolour and repaint like Bath stone, the

(1) See F. XXVII., p. 422; and see note (1), ante, p. 432, as to the omission of this stucco-work; covenant, if there are several houses.

XXXI.

Building
Underlease
with use of
Ornamental
Garden, etc.

—to commence
such work at
fixed time,
to preserve
uniformity ;
—and finish
same within
certain time.
On lessee's
neglect ;

—and after six
days' notice ;

—lessor may
execute works ;
—and charge
lessee with
expenses ;

—and that
pay same.

In case of
dispute as to
drains and
other ease-
ments,

—same to be
settled by
ground land-
lord or, etc.

—not to erect
other buildings
without leave ;

—nor cut
principal
timbers or
walls ;

—not to
commit any
nuisance ;

AND to the intent that the sd painting, recolouring, and rejoining, cleaning and scouring, may be done and completed at the same time or times as the like works shall be done in or to the adjoining or contiguous messes and buildings, with a view to preserve uniformity in the external appearance of all such messes and bldings, as nearly as circes will permit, it is hrbly agreed and declared that the painting of the sd outside wood and iron work, and the recolouring and rejoining of the sd outside stucco-work, and the cleaning and scouring of the sd outside stonework, shall be begun on the first Monday in the month of in every succeeding [fourth] year of the sd term hereby granted, and that all such works shall be executed and completed within one calr month from the time when the same shall be so resply commenced :

AND in case he, the lessee, shall neglect or omit, for the space of one calr month after the time or times so appointed for those purposes resply, to commence such external painting as afd, or the recolouring and rejoining of the sd outside stucco-work, or the cleaning and scouring of the sd outside stonework, or in case the same shall be commenced, and shall not be continued, completed, and finished within the time or times so appointed for those purposes resply as afd, then and in either of such cases, and as often as the same shall happen, it shall be lawful for the lessor, at the expiron of 6 days after notice in writing of his intention so to do, signed by the lessor or the architect, shall have been given to the lessee or left for him at or upon the sd messe, or dwg-hse, or bldings, in respect whrof such works resply shall have been so omitted to be commenced, continued, completed, and finished, to cause such respie works as shall not have been so commenced, continued, completed, and finished within the time or times appointed for those purposes resply as afd, to be executed and performed by any person or persons he may think fit to employ for those purposes resply, and to charge the lessee with the amount of all such costs, charges, and expenses which shall be incurred in the perfee of such works, or any of them :

AND he, the lessee, shall repay the same to the lessor, from time to time, upon demand : AND also that it shall be lawful for the lessor, and the sd [original lessor], his hrs and assns resply, either alone, or with workmen, or others, or to or for any officers, architects, surveyors, agents, or workmen, by them or him authorised, etc. [Power to lessor and ground landlord to enter premises to inspect condition and take inventory. Lessee to repair, etc., on notice. See F. XXVII., p. 432 ; F. XXVIII., p. 436] :

AND THAT it shall be lawful for the workmen employed by the lessor, or the sd [original lessor], his hrs and assns resply, or, etc. [Power to lessor and ground landlord, etc., and workmen to enter to repair adjoining premises. See F. XXVIII., p. 436] :

AND THAT, in case any dispute or controversy shall, at any time or times during the sd term hrbly granted, happen to arise between the lessor and the lessee, and other, the tenant or occupier, tenants or occupiers, of any such adjoining or contiguous messes, tenemts, or bldings, relating to the said water-courses or drains, or to any other easemts or privileges whatsoever, the same shall from time to time be settled and determined on the part of the lessor and lessee by the said [original lessor], his hrs and assns, or such other person as shall be authorised by him or them by any writing under their or his hands or hand, in such manner as they or he may think reasonable, and shall, by any writing under their or his hands or hand, order or direct in that behalf ; to which determinon they the lessor and lessee resply shall submit.

AND ALSO will not erect or build, or suffer to be erected or built, upon the sd premes hrbly demised, or any part throf, any blding or bldings, temporary or otherwise, other than such as shall be previously approved of by the lessor, his exors, admors, or assns, or by the sd [original lessor], his hrs and assns, or their architect for the time being, in writing ; nor [Covenant not to cut principal timbers or alter elevation, F. XXVII., p. 432] [Covenants not to alter premises ; nor use premises for trade, etc. ; not to commit any nuisance, etc. ; see p. 432] :

AND ALSO that the lessee will from time to time, and at all times during the sd term hrbly granted, perform and observe all and singular the covts and

and to covenent in the said indenture to be performed by the lessee, and on the part of the lessor, his executors, administrators, and assigns, to be fully performed and observed, except the covenants for [here state the covenants, such as to pay rent, or insurance, etc., which the underlessee is not to perform]. (u)

And also shall waive harmless and keep indemnified the lessor, and his lands and tenements, goods and chattels reply, of and from the said covenants and conditions reply (except as aforesaid):

And also of and from all actions, entries, forfeitures, losses, costs, charges, damages, and expenses whatsoever (including costs of defence as between solicitor and client), which law the lessor shall or may pay, bear, suffer, sustain, expend, or be put unto by reason of the breach of any covenant or agreement covenanted in the said indenture to be performed by the lessee, or for or by reason of any proceedings on account thereof, or of any other matter or thing incident or relating to all or any of the matters aforesaid:

AND ALSO, ETC. [Covenant to yield up premises at end of term, see p. 432]:

PROVIDED ALWAYS [Proviso for re-entry, see p. 433]: AND [Covenant for quiet enjoyment, see p. 433]:

AND that he the lessor will during the said term lawfully granted pay the said yearly rent of £ as as aforesaid reserved in and by the said indenture of lease of the day of and every part thereof; and shall perform, fulfil, and discharge all the covenants and agreements therein covenanted on his part to be performed, and observed:

AND ALSO shall waive harmless and keep indemnified the lessee, and the said premises, of and from the payment of the said yearly rent of £ :

And also of and from, etc. [all actions, etc., as above, substituting "lessee" (w)]:
 And the lessor hereby acknowledges the right of the lessee to possession of the said premises to be enjoyed by him from the day of and to deliver up copies thereof, AND hereby undertakes for the safe custody thereof:] :

AND IT IS HEREBY LASTLY AGREED, ETC. [insert clause as to operation of words "lessor" and "lessee," ante, F. XXVIII., p. 438]: [If the lease is for several years, see Covenant for apportionment of rent, F. XXVIII., pp. 437, 438.]

IN WITNESS, ETC.

(u) See ante, p. 246, and F. XXVIII., p. 423.

(v) A covenant is sometimes inserted that the underlessee shall not be liable to pay rent until the lessor shall have produced the receipt for the last half-year's rent reserved by the original lease. The following covenant that the underlessee shall retain out of the rent any amount he may pay on account of the original rent may, if desired, be used:

"AND that, in case any distress or distresses shall or may, at any time or times during the continuance of the term lawfully granted, be lawfully levied upon the premises hereby demised, or any part thereof, for the yearly rent of £ reserved by the said lease of land, or if the said lease shall be called upon or required to pay any money or moneys on account of such rent, or shall incur or sustain any loss or losses or expense or expenses of the non-payment thereof by the lessor, in pursuance of the covenant that he shall lawfully reserved, then and in such case, and from time to time so often as the same shall happen, it shall be lawful for the lessee to retain the rent hereby reserved, and so arrears thereof then due, or there to become due, until they or they shall be fully reimbursed and paid all the rent, moneys, and expenses which he shall have paid or expended as aforesaid, together with interest thereon at the rate of £5 per cent. per annum; provided that the lessee do and shall, when thereunto required, produce and shew unto the lessor the receipt of the lessor, or receipts or vouchers, for the payment or payments made by him or them, in the manner and for the purpose aforesaid."

XXXI.

Building Underleases with use of Ornamental Garden, etc.

—to perform covenants in original lease;

—and to indemnify lessor therefrom;

—to deliver up premises.

Proviso for re-entry. Covenants by lessor:

—for quiet enjoyment;

—to pay rent in original lease;

—to indemnify lessor therefrom;

—that underlessee may retain out of rent moneys paid for original rent.

XXXII.

Grant of Land for Building in consideration of Rent-charge.

Parties.
Testatum.
Grant.
Parcels.

Habendum ;

—to the use that grantor may receive a perpetual rent-charge.

Subject thereto to grantee in fee.

Covenants by grantee :

—to pay rent-charge ;

—to fence off the premises ;
—and to build ten houses within a certain time ;
—not to erect houses of less than certain

Subject to easements in favour of vendor.

XXXII.

GRANT of a PIECE of LAND (part of an estate), for building, in consideration of a rent-charge. (x) Covenants to build, to make drains, etc., footway, and to pay proportion of making and repairing roads. Power of entry in case of failure to build, etc.

THIS INDRE, made the day of 'BETWN A. B., etc. [*vendor*], of the one part, and C. D., etc. [*purchaser*], of the other part, WITNETH that in consen of the rent-charge hmar limited, and of the covts of the sd C. D. hmar contd, the sd A. B., AS BENEFICIAL OWNER, hrby grants and conveys unto the sd C. D.,

ALL, etc. [*parcels*], being part of an estate of the sd A. B. known as the este, which has been laid out for blding pposes, and which piece of land intended to be hrby conveyed is delineated on the plan drawn in the margin of these presents and is thrin coloured pink, the remr of the este being also shown on the sd plan and thrin coloured yellow. [*Reservation of minerals, if necessary* ; see F. XXVII., p. 430] :

TO HAVE AND TO HOLD the sd heres and premes UNTO the sd C. D. in fee simple,

TO THE USE that the sd A. B. shall have in fee simple a perpetual yrly rent-charge (y) of £ issuing out of the sd heres and premes and payable by equal half-yearly paymts on the day of and the day of in every year without dedon, the first half-yearly paymt throf to be made on the day of : (z)

AND SUBJECT to the said rent-charge and to the statutory powers and remedies for recovering and compelling payment thereof, To THE USE of the said C. D., in fee simple :

AND THE SAID C. D. hereby covenants (with intent to bind his assigns) with the sd A. B., THAT he, the sd C. D., his hrs, exors, admors, or assns, will henceforth pay the sd yearly rent-charge at the times and in the manner hrnbfre appointed for paymt throf, free from the land tax and all other rates, taxes, charges, duties, assessmts, and outgoing, now or hrar to become payable by the owner or occupier for or in respect of the heres and premes hrby granted, and from all deductions (except the property tax) :

AND WILL, immediately after the exon of these presents [*Covenant to fence off premes, ante, F. XXVIII., p. 434*] [*Covenant to build, (a) ib., p. 434*] [*Covenant not to alter elevation, etc., ante, F. XXVII., p. 432*] [*Covenant not to make bricks, ante, F. XXVIII., p. 436*] [*Covenant not to use premisses except for dwelling-houses, see F. XXVII., p. 432*].

(x) The following is a form of conveyance subject to easements in favour of the vendor :

"TO HOLD to [*purchaser*] in fee simple, To the use that [*vendor*], his hrs and assns, may have and enjoy the right of at all times passing and repassing with horses and vehicles as well as on foot over the carriageway which runs through, etc. ; and may have and enjoy from the now existing windows in, etc., a free and uninterrupted access of light and air to the sd windows, and subject to the use afsd : To the use of [*purchaser*] in fee simple : AND [*purchaser*] hrby covts with [*vendor*] that [*vendor*], his hrs and assns, shall at all times hmar have and enjoy the rights of way, and of light and air, hrnbfre limited, free from obstruction or interference of any kind by [*purchaser*], or any person deriving title under him."

(y) See p. 212, as to the meaning of "clear yearly rent-charge."

(z) It has been usual to insert a power of distress, and a power of entry and reception of rents, etc. ; but see now s. 44 of the Conveyancing Act, 1881, as to the remedies provided for recovery of annual sums charged on land by power of entry and distress, etc. The section, however, applies only so far as a contrary intention is not expressed, and has effect subject to the terms of the instrument under which the annual sum arises.

(a) See *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403, *ante*, p. 243, as to covenants.

AND that the boundary walls shall not be carried higher than _____, and shall be used as party walls by any person or persons building upon the adjoining plots of land, he and they paying a proportionate part of the expenses of keeping such boundary walls in proper repair [*Covenant to repair, ante, F. XXVII., p. 431*] [*Covenant to pay proportion of making and repairing walls, etc., see F. XXVII., p. 432*]. AND, etc. [*Covenants to insure, etc., and to rebuild, to expend insurance monies, and make up deficiency, etc., etc., F. XXVIII., p. 435 b*] [*Power of entry to grantor to inspect condition and give notice of defects, see F. XXVII., p. 432, and alter to suit this form*]:

PROVIDED ALWAYS, (c) and it is hereby agreed and declared, that if it shall happen that the sd. C. D., his heirs or assigns, shall refuse, neglect, or fail to build and complete within _____ from the date hereof the sd. houses or dwelling houses on the sd. premises, or in case the sd. C. D., his heirs or assigns, shall at any time or times hereafter during the life of any person a party to these presents, or at any time or times within 21 years from the death of the survivor of the several persons parties to these presents, fail to truly observe, perform, fulfil, and keep the covenants here and their parts herebefore contained, then and in such case, and when and so often as it shall so happen, and notwithstanding the waiver of any previous default, it shall be lawful for the sd. A. B., his heirs or assigns, into and upon the said heres and premises hereby granted, or any part thereof, in the name of the whole, to enter and the same hereafter to repossess and enjoy, as if these presents had not been made.

IN WITNESS, ETC.

XXXIII.

DEED OF COVENANT between purchasers of building plots forming one estate, prescribing the class of buildings to be erected, and containing other regulations to procure uniformity in building by purchasers. Provisions as to repair of roads and drains until taken over by public authorities, etc.

THIS INSTRUMENT, made the _____ day of _____, BETWEEN the several persons whose names and seals are reply subscribed and set in the 2nd Schedule hereof, of the first part, and A. B., of _____, in the county of _____, and C. D., of _____, in the county of _____, of the other part:

WHEREAS the several persons whose names and seals are reply subscribed and set in the sd. 2nd Schedule hereof have purchased from the sd. A. B. and C. D. the several plots of ground coloured _____, and distinguished on the plan hereunto annexed by the numbers reply set opposite to their respective names in the same Schedule: AND WHEREAS upon the occasion of such several purchases it was agreed that the sd. several persons, parties hereto of the 1st part, should enter into the following covenant:

(a) It is covenanted by the editors of Pritchard's Conveyancing (10th ed.), p. 354, that the following clause shall be inserted to prevent any doubt as to whether the benefit of the covenants can be assigned to purchasers of parts of the retained land:

"AND IT IS HEREBY DECLARED that the restrictive covenants herebefore contained are entered into with the sd. A. B. as the owner of the remainder of the sd. estate, of which the land hereby conveyed forms a part, and that the benefit of them may be assigned by the sd. A. B., his heirs and assigns, to any future purchaser or purchasers of any part of the estate which may be progressively affected by the breach thereof."

(b) See the similar power in *Ex parte Rough*, 1 De G. 119, upon which the above form is framed. As to whether this power can be assigned to assignors with the rent, see *ante*, p. 216. See also, pp. 215, 216, as to the restrictions in the right of conveyance provided by the Conveyancing etc. Act, 1881, and s. 14, by which, for the purposes of that section, a lease includes a grant at a fee farm rent.

(c) See *ante*, p. 224.

XXXII.

Grant of Land for Building in consideration of Rent-charge.

value, or excess as specified;
—not to alter elevation;
—not to make bricks;
—walls to be party walls;
—to repair, etc.;
—to insure.
Power to grantor to re-enter on failure of builder to build or perform covenants, etc.

XXXIII.

Deed of Covenant between Purchasers, prescribing Class of Buildings.

XXXIII.

Deed of Cove-
nant between
Purchasers,
prescribing
Class of
Buildings.

NOW THIS INDRE WITNETH that, in pursue of the sd agrmt, and in conson of the premes, each of them the said several persons parties hrtto of the 1st part

DORU hrby for himself, his hrs, exors, admors, appointees, and assns, covt with the other of them, his hrs, appointees, and assns, and also as a separate covenant with the sd A. B. and C. D., their hrs and assns, that they the sd several persons, parties hrtto of the 1st part, their hrs, appointees, and assns, and all persons claiming under them resply, will from time to time and at all times hrar pay on demand all and singular the sum and sums of moy which shall from time to time become due in respect of the plot or plots purchased by them resply under or by virtue of the terms, stipulons, and condons contd in the 1st Schedule hrtto, and will observe, perform, and fulfil all and every the covts, restrons, and agrmts as to the mode of building on, and the occupon of, the plots resply purchased by or conveyed to them, expressed or contained in the sd 1st Schedule, so far as the same resply relate to the sd respive plots so purchased by or conveyed to them as afsd, and so far as the sd covts, restrons, and agrmts are on their parts resply to be observed, performed, and lulfilled:

AND FURTHER that if at any time or times default shall be made by the owner or owners of any of the sd plot or plots in paymt of any moys payable in respect of such plot or plots by virtue of these presents for the space of 14 days after notice requiring him or them to pay the same shall have been given to him or them or left for him or them on any part of the sd plot or plots resply by the person or persons to whom such moys shall be payable, (e) then and in every such case it shall be lawful for such person or persons as last afsd to enter into and distrain upon the plot or plots in respect of which or the works whereon such monies shall have become payable or any part or parts of the same plot or plots resply, and to dispose according to law of the distress or distresses then and there found in like manner as in distresses taken for rent reserved by lease, or otherwise, to the intent that thrby or otherwise all such moys in respect of which such default shall have been made, and all costs and expenses occasioned by the non-paymt throf or in relation hrtto may be fully paid and satisfied: (f)

PROVIDED ALWAYS that no covt hrin contd shall be personally binding on any person or persons except whilst he or they shall resply be entitled to the plot or plots in respect of which the same covt is entered into, but the above covts are entered into with intent to bind all persons in whom the plot or plots of land shall for the time being be vested.

THE FIRST SCHEDULE to which the above Indre refers.

TERMS AND CONDITIONS. (g)

1. [*Insert here stipulation as to any sum originally charged on the lots.*]

2. [*Dimensions and descriptions, etc. Insert Cl. 1 of F. XLV., p. 463.*]

Purchaser
must maintain
boundaries.

3. EACH purchaser must undertake the care and maintenance of his boundary marks after the lot has been once stumped out by the surveyor of the vendors. If at any time a purchaser desires to have them restored, he must apply to the surveyor of the vendors, and pay the expenses for so doing.

Restumping.
Reservations
to vendors.

4. [The vendors reserve to themselves, or the survivor of them, his hrs or assns (excepting as regards the hotel stipulations), the power to deal with,

(e) This will be altered according to the circumstances of the case. See No. 1 of the conditions, *infra*.

(f) If it is stipulated that the vendors should also be parties to the deed in order to secure the performance of the covenants, add here a covenant by them, as regards the remaining plots, retaining the words "heirs and assigns," and alter the recitals accordingly. The power of distress given is probably void as an unregistered bill of sale.

(g) See also the building conditions under F. XI. B., p. 333, some of which may be used in this form, if required.

with it being subject to, and independently of, the conditions, any portion of the land now offered, which is not disposed of at this allotment; and with the foregoing exception they reserve in like manner the right of allowing a departure therefrom in any one or more cases. A.] They also reserve in like manner the right to carry through any lot, at any time, any sewer, drain, or water or gas pipe, or other work of a like nature.

XXXIII.

Deed of Covenant between Purchasers, prescribing Class of Buildings.

5. [Frontages and corners. Insert Cl. 2 of F. XLV., p. 463.]

6. [Building lines. Insert Cl. 3 of F. XLV., p. 464], "without the consent of the vendors, or the survivor of them, his heirs or assigns, in writing for that purpose."

Building lines.

7. One house only on each lot shall be erected, except with the consent in writing of the vendors, or the survivor of them, his heirs or assigns.

Number of houses.

8. On no lot shall any hotel, tavern, public-house, or beerhouse or beershop, be built, or any house be used as such, excepting on the lots numbered and , and no shop or warehouse, or any house to be used as such, shall be built on any lot except the lots numbered and , and on no lots shall any manufacture be carried on without the consent in writing of the vendors, or the survivor of them, his heirs or assigns.

Hotels or taverns, etc.

9. The principal entrance to the houses to be erected on the lots numbered to on the plan shall be on the side or end thereof, and the principal entrance to each of the other houses shall be on the side thereof, and all the offices shall be on the side of the several houses.

Position of entrance to houses.

10. The said houses shall be built in houses each [state here the class of building], of which the elevations and external architecture shall be approved of by owners, so as to procure uniformity of appearance.

Floors containing at least out of the

Elevations and architecture to be approved by majority.

11. The houses built on the several frontages to be of the description and minimum cost (exclusive of stalling) as follows: On, etc. [here insert the value of the houses to be erected on the various lots]. In calculating the bidding value of any house, it shall be taken to be the amount of the net first cost in labour and materials alone, exclusive of extraordinary decoration, and shall be estimated by the vendor's surveyor, having regard to current prices.

Value of houses to be built, etc.

12. Each purchaser is to make, when required, and afterwards to maintain, the boundary fences on the sides of his lot or lots marked within the boundary lines. All boundary fences and division fences between bidding lines and all boundary fences to be not more than 5 ft high; those behind bidding lines to be not less than 5 ft nor more than 6½ ft high. If any owner shall make default in erecting any such fence as aforesaid within 30 days, or in repairing any such fence within 10 days, after notice requiring him so to do shall have been given to him, or left for him at his residence or on his lot, by any adjoining owner, or by the vendor, or the survivor of them, his heirs or assigns, then such adjoining owner, or such vendor, or the survivor of them, his heirs or assigns, shall be at liberty forthwith to erect or repair any such fence, or to erect and keep in repair a temporary fence; and the owner making any such default shall on demand repay to such person or persons as aforesaid, all moneys expended by them or either of them for the purpose aforesaid, and all expenses relating thereto.

Fences to be made and maintained by purchasers.

13. The vendors have formed the road, and constructed sewers and drains thereon, and every owner of a lot and his tenants shall at all times have free drainage.

Roads and drains.

(A) This reservation should be carefully considered by purchasers, and will be omitted if the vendors are also parties to the deed of covenant. See ante, p. 211.

XXXIII.**Deed of Covenant between Purchasers, prescribing Class of Buildings.**

No other roads to be made.

No gravel to be removed.

Water-closets, etc.

Byelaws of local Acts.

Land tax.

use of the same : Provided always that until the public authorities shall take upon themselves the repair thereof, the owner of each lot is to pay to the vendors, or the survivor of them, his hrs or assns, his proportion of any repairs, and the expenses connected therewith, which may be performed or incurred by them or either of them ; such proportion to be adjusted by the vendor's surveyor with reference to the prices of the lots.

14. No other roads than those mentd in the preceding clause shall be made, and no lot or portion throf is to be made into or used as a road or way, without the consent in writing of the vendors, or the survivor of them, his hrs or assns.

15. No gravel, sand, or other materials of any kind, shall be excavated [*state here if except for building purposes on the plot*] upon any plot, without the consent in writing of the vendors, or the survivor of them, his hrs or assns.

16. [*No temporary erection to be made. Insert Cl. 7 of F. XLV., p. 464.*]

17. No water-closet or privy shall be erected on any plot, either detached or projecting from other buildings.

18. THE owner of each lot is to comply with, and these conditions are subject to, the rules, byclaws, and regulons of local public authorities.

19. THE lots are sold free from land tax and tithe.

THE SECOND SCHEDULE to which the above Indre refers.

Name.	Residence.	Description of lot.	No. on plan of lot purchased.	Signature and seal.	Witness to the execution and date.

SECTION IV.

MORTGAGES, ADVANCES, ETC.

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XXXIV.

Clause providing for advances to builder by landlord and deposit of building agreement, etc., to secure the same. (b)

XXXIV.

Clause
providing
for Advances
by Landlord
and Deposit
of Building
Agreement.

AND the sd A. B. doth hereby covenant with the sd C. D. to advance and lend to him, if and provided the said C. D. shall in all respects observe and perform his part of this agrmt, from time to time, such sum or sums of mpy (in the whole not exceeding £ . . .), for and towards the completion and finishing, and rendering fit for habitation, the sd messes or tenements and premises, when and as the surveyor for the time being of the sd A. B. shall by writing under his hand certify that the sd C. D. is entitled to call for such advances, but so that the sd A. B. shall not be required to make any such advance in respect of any house or building unless the value throf (exclusive of the land) shall be equal to . . . of the sum or sums then already and required to be advanced; And the sd C. D. doth hereby further covenant with the sd A. B. to pay such advance or advances, with interest for the same resply at the rate of £5 per cent. per ann, from the day or days on which such sum or sums resply shall be advanced and paid as afo, on or before the . . . day of . . . ; And further that, until such advance or advances and intt as afo resply shall be paid and discharged, the sd sum or sums and intt resply, or such part or parts throf resply as shall remain unpaid, shall be a charge upon the sd messes or tenements and premises intended to be demised as afo, from the time or respyve times on which the same shall be advanced as afo: And further that these presents, and the duplicate throf, shall for that purpose be deposited with the sd A. B. until the whole of the sd sum or sums and intt resply shall be paid and satisfied; And further that the sd C. D., and all other necessary parties who ever, shall from time to time and at all times hereafter, until payment of all such sum or sums as afo, and intt throf resply, upon the request of the sd A. B., and at the costs and charges of the sd C. D., make, do, and execute, or concur in, all needful and necessary acts, deeds, conveyances, and assurances whatsoever as the sd A. B. shall require for the better and more effectually charging the said messes or tenements and premises with the payment of such sum or sums of mpy and intt throf resply as afo.

(a) For a form of mortgage of the benefit of a building or engineering contract, see *Encyclopædia of Forms*, Vol. VIII., p. 655, and for a form of equitable mortgage of an agreement entitling a builder to a lease contingently on his erecting and completing specified buildings, see *ib.*, Vol. VIII., p. 719. This class of security was seriously affected by the decision in *West v. Williams* (1899), 1 Ch. 132.

(b) For another form, see *Kelly v. Smith*, 49 L. J. Ch. D. 283, and for a form of agreement to finance a builder (see *L. T. News*, Vol. 197, p. 298).

XXXV.

Advances by
landlord—
Alternative
Form.

SCHEDULE setting out the times at which advances are to be made during progress of work and the amounts to be advanced from time to time.

Another mode of providing for advances to the builder (and one which would probably avoid the disputes which not unfrequently arise as to the sum to be advanced upon any building) is to refer to a schedule to be annexed to the agreement, which should set out the times and also the particular sums to be advanced to the builder during the progress of the work; thus—

1. WHEN the trenches are excavated and concrete and foundations laid and when the walls and partitions are up and the first floor joists are fixed, the sum of £ .

2. WHEN walls and partitions are up and ceiling joists are fixed, the sum of £ .

3. WHEN the shops and premises are roofed in, chimney stacks gutters and down pipes are fixed and all the brickwork completed, the sum of £ .

4. WHEN the pointing, masonry and moulded terra cotta work are completed, hot water pipes, gas tubing, electric light and bell wiring is completed, staircases up, skirtings, cupboards, door frames, joints, linings, floor boards and all joinery fixed, including trimmers for hearths, drains in and connected with main drains, the sum of £ .

5. WHEN rendering lathing and plastering is completed, stoves, ranges, hearths, and chimney pieces are fixed, the external and internal doors hung and hot-water pipes fitted up to boiler, the sum of £ .

6. WHEN sashes are glazed (except shop fronts) and hung, all joinery work finished, one coat paint on all woodwork, plumber's work completed, bell fittings fixed, hand rails and balusters fixed, and boundary fencing erected, the sum of £ .

7. WHEN all the external and internal painting is finished, shop fronts and other ground floor fittings are completed, paper hung, locks, fastenings and other fittings fixed with the shop and premises finished and ready for occupation, the sum of £ .

XXXVI.

Memorandum
of Deposit
of Building
Agreement.

Agreement for
lease deposited
by way of
mortgage.

Charge on
premises
comprised in
agreement.

MEMORANDUM OF DEPOSIT by a builder of a building agreement to secure price of goods and materials supplied by a partnership firm. (c)

MEMORANDUM that I [builder] of, etc., have this day deposited with Messrs. [name of firm] of, etc., an agreement for a lease dated the day of and made between [builder's lessor] of the one part and myself of the other part, as a security for the payment to them of the sum of £ now owing to them by me on an account stated for goods and building materials supplied, and also for the payment by me of the agreed price of all other goods and materials which shall be supplied to me at my request by the said [firm] while they retain possession of the said agreement.

AND I hereby charge all my interest in the premises comprised in the said agreement, and in all buildings and fixtures now or hereafter to be erected thereon with such payment as aforesaid.

AS WITNESS, ETC.

(c) *Encyclopædia of Forms*, Vol. VIII., p. 716, prepared by A. Underhill, Esq., and Cecil Hartley, Esq., Barristers-at-law.

XXXVII.

XXXVII.

MORTGAGE by a builder of unfinished houses comprised in a building lease, **Mortgage by** where the money is to be advanced by instalments as the building proceeds. **Builder.**
Power to mortgage to enter and complete buildings. (d)

THIS INDRE, made the day of , BETWEEN [mortgagor] ETC. of the Parties, one part, and [mortgagee] ETC. of the other part. WHEREAS ETC. [recite building lease and parties]: AND WHEREAS the sd [mortgagor], requiring the sum of £ in order to enable him pursuant to the sd covt to erect upon the parcel of ground, so demised to him by the sd [lessor] as afd, the erections and bldings therein descd, hath applied to the sd [mortgagee] to advance the same to him, which he hath agrd to do in manner hereinaft mentl:

AND WHEREAS the sd [mortgagor] hath to the satisfaction of the sd [mortgagee] expended so much of the sd intnd erections and bldings as upon a valuation thereof appears to have cost the sum of £ : —that certain building has already been done;

AND WHEREAS the sd [mortgagee], in pursue of the sd agrmt in this behalf, did on the day of last advance to the sd [mortgagor] the sum of £ , and to secure the repayment thereof, and also of such further sums of mcy as may be advanced by the sd [mortgagee], in further pursue of the sd agrmt, with intt for the same rply, as hereinaft mentl, the sd [mortgagor] hath agrd to execute to the sd [mortgagee] such security as is hereinaft contl: —and certain sum has been advanced.

NOW THIS INDRE WITNEETH that, in pursue of the sd agrmt, and in conson of the sum of £ — so by the sd [mortgagee] to the sd [mortgagor] advanced and lent as hereinaft mentl, the receipt whrof is hereby acknowl, and in conson of the covt by the sd [mortgagee] hereinaft contl to make such further advances as are therein mentl, ILE, THE SD [mortgagor], hereby covts with the sd [mortgagee] to repay on the day of unto the sd [mortgagee] the sd sum of £ — so advanced as afd with intt for the same computed from the day of after the rate of £ per cent per ann, and if the sd sum of £ shall not be pd on the day of , then to pay to him interest on the sd pdal sum, or on so much throf as shall for the time being remain unpaid, after the rate afd, by equal half-yearly paymts on the day of and the day of in every year, AND also to repay unto the sd [mortgagee] such sum as shall be here advanced by the sd [mortgagee] unto or on account of the sd [mortgagor], togr with intt for the same after the rate of £ per cent per ann, to commence from the time of advancing the same, at the expirn of six calr mos next after such sum as afd shall be advanced, and if the last mentl arm shall not be paid at the expirn of the sd six calr mos, then to pay to the sd [mortgagee] intt for the same, or so much throf as shall for the time being remain unpaid, after the rate afd by equal half-yearly paymts on the same days as are hereinaft appointed for paymt of the intt on the sd pdal sum of £ :

Covenants by mortgagor to pay principal sum and interest.

AND THIS INDRE ALSO WITNEETH that, in full pursue of the sd agrmt and for the same reasons, the sd [mortgagor] AS BENEFICIAL OWNER hereby assigns (e) and conveys unto the sd [mortgagee] ALL AND SINGULAR the piece of ground, hereinaft descd, and premises comprised in and demised by the sd recitd intro of lease, and also all erections and bldings which are now standing or hereinaft shall be erected on the sd piece of ground: (f) To hold the same unto the sd [mortgagee] henceforth during all the residue which is now unexpired of the sd

Mortgagor assigns to mortgagee.

(d) Stamp duty on mortgage money, including prospective advances; Stamp Act, 1891. See an alternative form in the *English Law of Property*, Vol. VIII., p. 690. For other forms, see *Practical Precedents* (11th ed.) (1901), Vol. I., p. 65; *By Ass and Jernam's Conveyancing* (1895), Vol. III., p. 110.

(e) If the mortgage is by demise, omit the word "assigns," and insert in its place the word "demises."

(f) Where materials and plant are assigned, see the provisions of the Bill of Sale Act, 1882, 45 & 46 Vict. c. 115.

XXXVII.

Mortgage by
Builder.

Habendum.
Proviso for
redemption.

term of years created by the said recited indre of lease, (g) subject [to the rent and to the covenants and stipulations in the sd indre of lease reserved and contd, and subject also (h)] to the proviso for redemption hereinafter contd :

PROVIDED ALWAYS, AND IT IS HERBY AGREED AND DECLARED, that if the sd [mortgagor] shall pay unto the sd [mortgagee] the sum of £ , with intt for the same, as herebefore covtd to be pd by him on the said day of next, and in case the said [mortgagee] shall as herebefore covtd advance a further sum or sums to or on account of the sd [mortgagor], Then if the sd [mortgagor] shall, at the expiron of six calr mos from the time or times of such advancement or advancements resply, pay unto the sd [mortgagee] all and every the sum or sums of moy so advanced by him with intt for the same resply as herebefore covtd from the time or respive times of his advancing the same resply, clear of all dedons for taxes, or upon any other account whatsoever [And if the sd [mortgagor], his hrs, exors, admors, or assns shall henceforth duly pay and perform the rents and covts resply reserved and contd by and in the sd herebefore recited indre of lease and which, on the part of the lessee therein named, ought to be paid and performed, and shall effectually keep indemnified him the sd [mortgagee], his exors, admors, or assns thrfro (h)], Then and in such case, and immedly after such several paymts [and such performance as aforesaid, he the sd [mortgagee] will, upon the request and at the costs of the sd [mortgagor], reassign the said premes unto the sd [mortgagor], his exors, admors, and assns, or as he or they shall direct, free from all incumbs whatsoever made or created by the sd [mortgagee] (i)],

Covenants by
mortgagor ;
—to finish
buildings ;

AND the sd [mortgagor] hereby covts with the sd [mortgagee] that he the sd [mortgagor] will complete and in all respects finish the messes and bldings, and all other the messes and bldgs, which are to be erected on the sd piece of ground before the day of pursuant to his covt contd in the sd recited indre of lease :

—that in
default by
mortgagor,
the mortgagee
may enter
and complete
buildings ;

AND further that if the sd [mortgagor] shall make default in this respect, then and in such case it shall be lawful for the sd [mortgagee], his exors, admors, or assns, to enter into and upon the said premes and to finish and complete the sd messes and bldings, according to the true intent and meaning of the sd covt, in such manner as he or they shall think proper, and for that purpose to enter into such contracts with builders and others, as may be deemed expedient :

—that mort-
gagor will
pay monies so
expended
with interest ;

AND that he the sd [mortgagor] will on demand pay unto the said [mortgagee] all and every the sum and sums of moy which he or they shall expend in such works as aforesaid, with intt thron at the rate aforesaid, from the time of the expenditure throf ; and the sd premes shall stand and be charged and chargeable with the paymt of the same moys and intt, and the same shall and may be raised in the same manner as the sd ppal sum and intt, and the other moys hereby intended to be secured by virtue of these presents :

—and pre-
mises shall be
a security for
such monies ;
—to insure.

AND ALSO that he the said [mortgagor] will, at all times during the continuance of this security, keep the sd premes insured against loss or damage by fire, in the sum of at least, in conformity with the covt in that behalf contd in the sd indre of lease, and will duly pay the premiums and sums of moy payable for that purpose, and immedly upon every such paymt deliver to the sd [mortgagee], his exors, admors, or assns, the receipt for the same :

Covenant by
mortgagee
to advance
further sums
according to
the progress of
the building.

AND THE SD [mortgagee] hereby covts with the sd [mortgagor] that he the sd [mortgagee] will advance and lend to the sd [mortgagor] such sums of moy as are next hereinafter mentd (that is to say), the sum of £ , when so much of the sd intended messes or bldings shall be completed as upon a valuation throf by the surveyor of the [mortgagee] shall appear to have cost the sum of ; and the sum of £ when the sd intended messes and bldings shall have been covered in ; and the sum of £ when the sd intended messes and bldings shall be completely finished and fit for habitation :

(g) If the mortgage is by demise, add here the words "except the last day of the said term."

(h) These words will be omitted if the mortgage is by demise.

(i) If by demise, omit the words in brackets, and substitute the following: "the demise hereby made shall be void."

PROVIDED ALWAYS that the sd [mortgagor] shall not be bound to advance any of the sums of money aforesaid until his surveyor shall have given a certificate in writing that the sd sum or sums have been expended upon the sd intended messuages and buildings, or that the sd intended messuages and buildings have been covered in or completed (as the case may be) to the satisfaction of such surveyor, and in conformity with the sd recited in re of lease, and the fee of £ shall have been paid by the sd [mortgagor] for such certificate aforesaid: Nor unless the sd [mortgagor] shall have duly paid all moneys which at the time when such advance ought to be made shall be owing on this security, and shall have duly observed all the covenants on the part of sd [mortgagor] herein contained:

AND IT IS HEREBY AGREED that the sd [mortgagor] or any person deriving title under him shall not, except with the consent in writing of the sd [mortgagee] or the person or persons for the time being deriving title under him, exercise the powers of leasing or of agreeing to lease conferred by the Conveyancing and Law of Property Act, 1881, on a mortgagor while in possession, but it shall not be necessary to express such consent in any such lease. (k) [(See below if by demise).]

AND IT IS HEREBY LASTLY DECLARED that all persons deriving title under the sd [mortgagor] or the sd [mortgagee] respectively, shall be bound by and entitled to the benefit of the covenants, agreements, and conditions herein contained as if they had been respectively named herein, except where the context may require a different construction. (m)

IN WITNESS, ETC.

XXXVIII.

SHORT FORM of mortgage of a building agreement entitling the builder to separate leases. (n)

THIS INSTRUMENT, made the day of , BETWEEN A. B. [mortgagor], etc., of the one part, and C. D. [mortgagee], etc., of the other part:

WHEREAS by an agreement etc. [recite agreement]:

(l) Omit or insert this as the case may be. As to the leasing powers of a mortgagor in possession, s. 18 of the Conveyancing Act, 1881.

(k) If the mortgage is by demise, the following will be inserted:—

"And the sd [mortgagor] hereby covenants with the sd [mortgagee] that the sd [mortgagee] will henceforth stand possessed of the premises comprised in the sd lease for the residue of the term thereby granted: IN TRUST for the sd [mortgagee] and to assign and dispose of the same as he or the persons or person deriving title under him shall from time to time direct, but subject to the proviso for redemption herein contained."

(m) See s. 17 of the Conveyancing Act, 1881, as to restrictions on consolidation. It is important to observe that in loans to builders, where it is intended to make numerous advances, the right to consolidate should be reserved, and the following form should be inserted before the last clause.

"AND IT IS HEREBY AGREED that the sd [mortgagee] and the persons deriving title under him shall have the same right to consolidate two or more mortgages, so that one shall not be redeemed unless the other or others, as would have existed if the Conveyancing and Law of Property Act, 1881, had not been passed."

(n) This form may be useful where an advance of money is required in haste, but it is important that the mortgagee should secure a grant of the lease to himself; or, if the leases are granted to the mortgagor, a mortgage of them should be immediately obtained by the mortgagee, in order to be properly secured. The above is supposed to be an agreement to grant a lease to the lender or his assignee, containing no condition against assignment. For a form of mortgage by a builder of land comprised in an agreement entitling him to separate leases from the frontiers as the houses are completed, to secure advances to be made for the purpose of enabling him to complete the houses, see *Prieleur*, 15th ed. (1894), Vol. I., p. 650.

XXXVII.

Mortgage by Builder.

Prov so that mortgagee's surveyor's certificate must have been previously given;

—and interest have been paid, etc., by mortgagor.

Declaration as to leasing powers.

XXXVIII.

Mortgage of Building Agreement. (Short form.)

Parties.

Recite building agreement,

Residue of term if by demise.

Right to consolidate.

XXXVIII.

Mortgage of Building Agreement.
(*short form.*)

—that houses have been built;

—agreement for advance.

Testatum.

Covenant by mortgagor to repay on demand.

Assignment of premises.

Proviso for redemption.

Covenants by mortgagor;
—to complete houses in accordance with agreement;

—that mortgagee may enter and sell, etc., in default;

—to procure leases to mortgagee or to execute mortgages of the same.

Expenses, etc., of these presents and other acts made necessary to be borne by mortgagor.

AND WHEREAS the sd A. B., in pursue of the sd agrmt, has built two of the houses thrin mentd, and partly built the remaining three throf:

AND WHEREAS the sd A. B. has applied to the sd C. D. for the immediate loan of £ , which the sd C. D. has agreed to advance on having the same secured togr with intt at £ per cent per ann in manner hrrar provided,

NOW THIS INDRE WITNETH that in pursue of the sd agrmt and in conson of the sum of £ at or before the exon hrof to the sd A. B. (hrrar called "the mtgor") pd by the sd C. D. (hrrar called "the mtgee") (the receipt whrof the mtgor doth hrby acknowledge), the mtgor hrby covts with the mtgee, etc. [*continue as in F. XXXVII., p. 455*]:

AND THIS INDRE ALSO WITNETH that in furr pursue of the sd agrmt, and in conson of the premes, the mtgor AS BENEFICIAL OWNER (o) hrby assigns unto the mtgee the piece of land comprised in the sd recited agrmt, and the houses now erected or hrrar to be erected thron in pursue throf, (p) and also the benefit of the sd agrmt: To HOLD the same unto the mortgagee henceforth during all the residue now unexpired of the said term of years, subject to the proviso for redemption hrrar contd:

PROVIDED ALWAYS that the mtgor shall at his own expense have a reassignment of the sd premes if he shall pay to the mtgee the sd sum of £ with intt as afsd:

AND the mtgor hrby covts with the mtgee that he the mtgor will forthwith and continuously proceed with and complete the erection of the sd 5 houses, and otherwise do, perform, and observe all the covts, provises, and condons contd in the sd agrmt, AND that in default thereof (of which default or alleged default the decision of the surveyor for the time being of the sd [lessor], or the surveyor for the time being of the sd mtgee, shall be final and conclusive), or on breach of any of the covts, condons, or agrmts hrrin on the mtgor's part contd, or in default of paymt of ppal or intt in manner afsd [or if the mtgor shall become bankrupt or die during the continuance of this security], then and in any such case it shall be lawful for the mtgee thron on or at any time thrrar to enter into and upon the sd piece of land, and to take posson of the whole or any part of the premes hrby assnd, and to complete the sd houses, and to carry out the sd agrmt, and take a lease or leases throf, or at his option to sell the premes hrby assnd or any part throf as he shall think fit, or otherwise deal with the sd premes in any manner which he the mtgee may deem best for his own protection, and to apply the proceeds throf in accordance with the statutory powers of sale conferred upon a mtgee [*insert covenant to insure, if necessary*].

AND the mtgor further covts with the mtgee that he the mtgor will, when and so soon as a lease can be obtained in accordance with the sd agrmt, procure from the sd [lessor], at his own costs and expense, a separate lease of each of the sd hses to be granted as the mtgee may direct either to the mtgor or to the mtgee, and if such lease shall be granted to the mtgor then that he the mtgor will forthwith make and execute to the mtgee a valid and effectual mtge of the premes contd in such lease, either by way of assmnt or underlease, in order to secure such part of the moy then owing upon this security to the mtgee as he the mtgee may desire to apportion to the premes contd in such lease, with intt thron after the rate afsd: And a power of sale and all such other powers and provisions shall be contd in the sd mtge as shall be required by the mtgee:

AND IT IS HRBY AGRD AND DECLARED that all the costs, charges, and expenses, as between solor and client, of the mtgee of and incidental to these presents and anything hrrin contd, or any act, matter, or thing, to be done by him in pursue of the provisions of the sd agrmt of the day of , or of these presents,

(o) As this is only a mortgage of an agreement, it may be suggested, although the author thinks that there is no ground for such suggestion, that the provisions of the Conveyancing Act, 1881, as to implied covenants for title do not apply; and, if desired, the ordinary covenants for title may be inserted.

(p) Where materials and plant are assigned, see the provisions of the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, and see *ante*, p. 178.

or in relation thereto reply, shall be borne and paid on demand by the mortgagor, and until payment shall be made, and they are hereby made a charge upon the premises hereinafter and or expressed so to be [insert, if necessary, declaration as to leasing powers, see F. XXXVII., p. 457; and clause as to consolidation, see ib., p. 457, note (a)]:

XXXVIII.

Mortgage of
Building
Agreement.

AND IT IS HEREBY LASTLY DECLARED that the words "mortgagor" and "mortggee" (*short form*) shall include all persons deriving title under the said A. B. and C. D. reply, except where the context may require a different construction.

IN WITNESS, ETC.

SECTION V.

PARTY STRUCTURE NOTICES UNDER THE LONDON BUILDING ACT, 1894.

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XXXIX.

XXXIX. (a)

Party Notices.

NOTICE relating to party structures (general form).

THE LONDON BUILDING ACT, 1894.

57 & 58 VICTORIA, c. cexiii., Part viii., sections 88 to 92 inclusive.

To [name of adjoining owner] of [address]. As building owner of the premises known as [describe premises], and with reference to the party [wall or other party structure as the case may be] separating the said premises from the adjoining premises on the side thereof known as [describe adjoining premises] hereby give you notice that after the expiration of month (b) from the date of service hereof intend to exercise the rights given to by the London Building Act, 1894, Section , Sub-section , by executing the works undermentioned, viz.: [here describe works] (c), and propose to commence the work on or about .

I hereby appoint Mr. [name of surveyor], of [address of surveyor], to act as surveyor.

[Signature]

Building owner.

[Address]

Dated this day of , 190 .

If the adjoining owner do not within 14 days after the service of this notice express his consent thereto, he will be considered to have dissented therefrom (see Section 90), and in such case the Act requires him to appoint a surveyor (Section 91) (1).

(a) This form and Forms XL. to XLIV. are here inserted by the kind permission of the Royal Institute of British Architects. Useful notes are printed on the backs of the forms supplied by the Institute.

(b) At least two months in the case of a party structure; at least one month in the case of a party wall.

(c) The description should be so clear and intelligible that the adjoining owner may be able to see whether he ought to give a counter notice, and what the nature of any such notice should be: *Hobbs v. Grover* (1899), 1 Ch. 11. It is best to attach a plan to the notice showing exactly the work which it is proposed to carry out.

XLI. (d)

XL

NOTICE of intention to build within ten feet of, and at a lower level than, adjoining owner's building. Party Notices.

THE LONDON BUILDING ACT, 1894.

57 & 58 VICTORIA, c. cexiii., Part viii., section 93.

To [name of adjoining owner], of [address]. As building owner of the premises known as [describe premises] hereby give you notice that after the expiration of two months from the date of the service hereof I intend to erect within ten feet of the building belonging to you on the _____ side of my own premises, and situate and being [describe adjoining premises] a building or structure _____ part of which within the said ten feet, and as shown on the plans and sections annexed hereto, will extend to a lower level than the foundations of your building, and to exercise the rights given to _____ by the London Building Act, 1894, by executing the works undermentioned, viz.: [here describe the building or structure] and _____ propose to commence the work on or about the _____.

I hereby appoint, etc. [Conclude as in F. XXXIX., supra.]

NOTE.—If the adjoining owner shall within fourteen days after being served with the above notice give a counter notice in writing that he disputes the necessity of, or requires such underpinning or strengthening, a difference shall be deemed to have arisen—Section 93 (2)—and in such case the Act requires him to appoint a surveyor—Section 91 (1).

XLI. (e)

NOTICE with reference to external walls with footings projecting into adjoining owners' premises.

THE LONDON BUILDING ACT, 1894.

57 & 58 VICTORIA, c. cexiii., Part viii., section 87 (5 and 6).

To [name of adjoining owner], of [address]. As building owner of the premises known as [describe premises] hereby give you notice that after the expiration of one month from the date of service hereof I intend to erect an external wall on _____ own land adjoining your land situate and being [describe adjoining premises] on the _____ side of the said external wall, and to exercise the right given to _____ by the London Building Act 1894, by erecting a wall of the following description [describe wall], and by placing the projecting footings and foundations of said external wall on your land.

I hereby appoint, etc. [Conclude as in F. XXXIX., supra.]

XLII. (f)

FORM relating to party walls on line of junction of adjoining lands.

THE LONDON BUILDING ACT, 1894.

57 & 58 VICTORIA, c. cexiii., Part viii., section 87 (1, 2, 3, and 4).

To [adjoining owner] of [address]. As building owner of the premises known as [describe premises] hereby give you notice that I desire to

(d) See note (a), F. XXXIX., supra.

(e) See note (a), F. XXXIX., supra.

(f) See note (a), F. XXXIX., supra.

XLII. build a party wall partly on own land adjoining your vacant land situate and being [*describe adjoining vacant land*] and to the of own said land.
Party Notices.

The said party wall is desired to be of the following description [*describe party wall*] shall be obliged by your consent and by your furnishing with the name of your surveyor.

I hereby appoint, etc. [*Conclude as in F. XXXIX., supra.*]

XLIII. (g)

FORM of appointment of a third surveyor.

THE LONDON BUILDING ACT, 1894.

Part viii., section 91.

We the undersigned surveyors duly appointed to act respectively on behalf of [*give name of building owner*], the building owner of the premises known as [*describe the premises*], and [*give name of adjoining owner*], the adjoining owner of premises known as both of the said premises being referred to in the notice served by the said building owner on the said adjoining owner on the day of , 19 , hereby select Mr. of as third surveyor.

Surveyor to build- { *Signature*
ing owner { *Address*

Surveyor to the { *Signature*
adjoining owner { *Address*

Dated this day of .

XLIV. (g)

FORM of notice requiring surveyors to appoint a third surveyor pursuant to section 91 (1) of the London Building Act, 1894. (h)

THE LONDON BUILDING ACT, 1894.

Section 91.

Whereas [*here give name of building owner*] as the building owner and [*here give name of adjoining owner*] as the adjoining owner did respectively appoint and [*names of surveyors*] for the settlement of the differences which had arisen between them under a party structure notice issued under the London Building Act, 1894, and dated the day of , 19 , relating to the party wall between and [*here give description of the adjoining plots*].

Now I [*the building owner*] hereby request you the said and [*names of surveyors*] so appointed as aforesaid, to select a third surveyor in accordance with the provisions of the said Act within the space of seven days after the service of this request, and in case you neglect so to do, we shall, in accordance with the provisions of the said Act, cause an application to be made to a Secretary of State to select some fit person to act as a third surveyor.

Dated this day of 19 .

Signed [*give name of building owner*].

To [*names of surveyors*].

(g) See note (a), F. XXXIX., *supra*.

(h) L. B. A., 1894, s. 91 (10), *post*, p. 519.

SECTION VI.

MISCELLANEOUS PRECEDENTS.

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XLV.

XLV.

CONDITIONS OF SALE BY AUCTION of building land in lots. The conditions will be in the usual form, including the following clause: (a)

Conditions
of Sale by
Auction of
Building
Land.

THE lots are sold subject to certain stipulations, either printed on or accompanying the published particulars and plan, and such stipulations and any other conditions or stipulations contained in the foregoing papers, shall apply only to the lot or lots sold at the present sale, except so far only as the vendors may be willing to make the same or any like conditions or stipulations on any future sale. And the purchaser of each lot shall in his conveyance covenant to perform such stipulations, and the covenant shall be so framed that the burden thereof shall run with the land as far as may be, and shall on completion of his purchase, if required, and at his own expense, execute a duplicate of such conveyance, but such duplicate shall be prepared by the vendors at their expense. *b)*

STIPULATIONS.

1. *Dimensions, &c.*—The dimensions of the lots and the other statements and descriptions of the property and matters connected therewith, appearing on the plan and in these stipulations, must be assumed to be correct; and any discrepancy between these dimensions and the lots as staked out shall not annul the sale, or be a ground on either side for compensation.

2. *Fences and Curriers.*—Of each corner lot the shorter external boundary

(a) For a set of conditions of letting several plots on a building estate by auction, see *Exemplary Forms*, Vol. VII., p. 178.

(b) If there is to be a general deed of covenant [as to such deeds, &c., see *ante*, p. 229] between the purchasers, substitute the following form for the above:

"Every purchaser shall execute, on the day completion of his purchase, the deed containing the covenants to observe and perform the said conditions and stipulations so far as the same are applicable to the lot or lots purchased by him. [The said deed contains a similar covenant by the vendors as regards any lot or lots not sold.] A draft of the said deed may be seen at the office of _____, the vendor's solicitor, on any day before the sale." [There will follow a condition that the vendor will retain the documents and give the statutory acknowledgment and undertaking as to the same.]

XLV.
Conditions
of Sale by
Auction of
Building
Land.

shall be deemed the front, and the longer the side or flank, and houses thron shall be built accordly.

3. *Building Lines.*—The blding lines are to be at the distances from the road boundaries shown on the plans, viz. in respect to lot 1, ft. from and ft. from Road [so also as to other lots]; and, excepting ordinary architectural dressings or bay windows, (c) no erection, or blding, or portion thbrof is to project upon or overhang the space between blding lines and road boundary.

4. *Fences.*—Each pchaser is to make, when required, and afterwards to maintain close boundary fences on the sides of his lot or group of lots marked T within the boundary lines; those between blding line and road boundary not more than ft. high; those behind blding lines not less than nor more than ft. high. If any purchaser shall make default in erecting any such fence as afsd within days, or in repairing any such fence within days after notice requiring him so to do shall have been given to him or left for him at his residence, or on his lot or group of lots, by any adjoining pchaser or (in the absence of sale) by the vendors, then such adjoining purchaser or vendors shall be at liberty forthwith to erect or repair any such fence, or to erect and keep in repair a temporary fence; and the pchaser making any such default shall, on demand, repay to such adjoining pchaser or the vendors all moneys expended by the former or latter for the purposes afsd and all expenses relating thrtto.

5. *Road and Lighting Rates.*—Each pchaser of a lot shall, on the day of in each year commencing on the day of next succeeding the completion of each messe or dwg-hse or shop to be erected thron, pay to the vendors the sums following, that is to say, in respect of lots to the sum of , in respect of lots to the sum of , etc., and in respect of all the other lots the sum of in respect of each such messe or dwg-hse or shop towards the expenses of maintaining and keeping the roads in proper order and condon so long as the vendors shall elect to keep the same in such order and condon, or until the same shall be taken over by the parish or some other local or competent authority, so as to be thrar repaired and kept in order by the parish or such other authority, and also will in like manner, and at the times afsd, pay to the vendors the sum following, that is to say, in respect of lots to the sum of , and in respect of all the other lots the sum of in respect of each messe or dwg-hse or shop so to be erected as afsd towards the expense of lighting the roads on the sd este, so long as the vendors shall light the same, or until the lighting thereof shall be undertaken by the parish or some other competent authority.

6. *Other Roads or Ways.*—No lot or portion throf is to be made into or used as a road or way.

7. *Temporary Erections.*—No temporary blding of any kind is to be erected on any lot, except sheds or workshops to be used only for the works incidental to the erection of the house or houses or other structures to be built thereon [or on some other lot], and no steam engine or mortar mill is to be placed on any lot.

8. *Hotels or Taverns, Shops, etc.*—Upon the land now offered for sale no hotel, tavern, public-house, beerhouse, or shop for the sale of wines, spirits, ale or stout, or any malt or exciseable liquor of any kind, either by wholesale or retail, to be consumed on or off the premises, shall be built, nor shall any house be used as such, and on no lot shall any manufacture or obnoxious business (d) be

(c) This is only suitable for land in the country. As to bay windows and building line in town, see p. 227. As to acquiescence in a breach of a covenant of this kind, see *Dowsett v. Ramuz*, Appendix, p. 659.

(d) See p. 232, *et seq.*

carried on; and no bldg shall be used for the reception of lunatics or idiots, nor for any infirmary, nor shall any mess or bldg to be erected or built on any of the lots fronting Road, or Road, be used for any other purpose than as a private dwg-hse.

XLV.

Conditions
of Sale by
Auction of
Building
Land.

9. *Building Values*.—One house on each plot, comprised in lots to , fronting Road, to be of the minimum cost of £ ; one house on each plot, comprised in lots to , fronting or Road, to be of the minimum cost of £ , etc.; not more than two houses on each plot, fronting Road, of the minimum cost of £ each house; one house or shop on lots and , fronting Road, to be of the minimum cost of £ , etc.

10. *Bldgs*.—On no lot, except lots and , shall more than one house be built; and on lots not more than two houses shall be built, nor until a house be built shall any domestic office or stable, or other inferior permanent building, be erected. The plans and elevations of all proposed bldgs shall be submitted to the vendors and approved by them or their surveyor for the time being, before the commencement of the bldg, but no fee shall be payable for such approval [or state fee payable].

11. *Party Walls*.—No side wall of any house on any lot is to be built as a party wall, that is to say, having one moiety of its thickness on an adjoining lot, without the consent in writing of the owner of such adjoining lot.

12. *Water-closets, Privies, and Drainage*.—On no lot shall any water-closet or privy be erected detached from other buildings. A separate cesspool shall be provided for each house, the water shall be laid on to cisterns, the soil pipes shall be ventilated above the roof, and all waste pipes shall empty in open air.

13. *Footpaths*.—Each purchaser shall curb and gravel, pave and asphalt the footpath in front of the lot or lots purchased by him or her.

14. *Tithe Rent-charge*.—The tithe rent-charge, payable in respect of the estate, not having yet been apportioned, each purchaser shall pay to the vendors annually, on the day of , until the same shall be reapportioned, the sum of for all lots to inclusive, and each for lots to and to inclusive, and each for lots and .

15. *Registering Deeds*.—All conveyances (except mtges) and leases for terms exceeding 21 years, and assnmts of such leases, shall be registered at the estate office of the vendors, and a fee of paid by each such registration.

16. *Local Acts and Byelaws*.—These stipulations are subject to the rules, byelaws, and regulations of local public authorities.

XLVI.

AGREEMENT AS TO ENJOYMENT (f) of light upon certain terms. (g)

XLVI.

AN AGRM'T, made, etc.: WHEREAS the sd A. B. and C. D. are seized in fee simple of the house and premises, No. Street aforesaid, and the sd E. F. is the tenant for life of the house No. 7 in the same street and the premises occupied

Agreement
as to Light.

(c) As to party walls generally, see p. 318, *ante*. For another form of covenant as to party walls, see *Irring v. Turnbull* (1900), 2 Q. B. 129, *noted ante*, p. 325.

(f) A notice of this agreement should be indorsed on one or more of the leading title-deeds of the tenements. For a form of exchange by owners of rights of way through their respective premises, see *Encyclopædia of Forms*, Vol. III., p. 547; for a grant of way leaves, see *L. T. Newsp.* Vol. III. (Aug. 24, 1901), p. 397.

(g) See *Bentley v. Atkinson*, 13 C. B. D. 243.

E.B.C.

2 H

XLV.
 —
 Agreement as
 to Light.

with it, part of which are situate at the rear of the said No. 9 Street:
 AND WHEREAS the sd A. B. and C. D. propose to reconstruct the rear portion of
 their sd house and premises by removing the existing back wall throf, which faces
 toward the west and overlooks a part of the back premises of No. 7 Street
 afsd, about 20 ft eastwards, and by placing therein windows (h) on the 1st,
 2nd, and 3rd floors thereof and erecting a skylight of [state size] over a portion
 of the ground floor throf. NOW IT IS HERBY MUTUALLY DECLARED AND AGREED AS
 FOLLOWS:

1. THE sd A. B. and C. D. do hereby, for themselves and so as to bind their and
 each of their heirs and assigns and any pson or psons claiming through or under
 them, acknowledge that the access of light and air to the sd house and bldgs,
 No. 9 Street afsd, through or by means of the windows and skylight to be
 opened and erected in the rear portion of their sd house as afsd, is had and
 enjoyed by them solely, by the consent and sufferance of the sd E. F., and so
 that no easement or right in respect throf shall be acquired by prescription or
 orwise by them, the sd A. B. and C. D., their heirs or assigns, or any pson or
 psons claiming through or under them.

2. THE sd windows and skylight in the rear portion of the said house, No. 9
 Street, shall be deemed to have been opened and erected, and the access
 of light and air thryby shall be deemed to be enjoyed, with the express licence
 and consent of the said E. F.; and the sd E. F., his heirs and assigns, and any
 pson or psons claiming through or under him or them and his successors in title,
 or any pson or psons now or here entitled to any estate in the sd premises, No. 7
 Street afsd, shall be at liberty to raise the walls of or on the premises
 occupied with the sd No. 7 Street, or to erect walls on the south and
 west sides of the sd No. 9 Street, to any height they may please, without
 objection on the part of the sd A. B. and C. D., their heirs or assigns, or any
 pson or psons claiming through or deriving title under them.

3. THIS agrmt is in no way to restrict the rights and privileges of the sd A. B.
 and C. D., or their heirs or assigns, in respect of the ancient light situate in the
 south wall of No. 9 Street afsd overlooking No. 7 Street afsd.

AS WITNESS, ETC.

XLVII.
 —
 Agreement
 with Archi-
 tect.

XLVII.

AGREEMENT WITH ARCHITECT. (i)

1. [*The architect*] will prepare sketch plans, elevations, and sections of the
 intended blding, having regard to the proposed cost, so that a contract may be
 made for it, including fixtures and fittings, warming, ventilating, lighting,
 boundary fences, lodges, and every other work necessary to render the blding fit
 for occupation, except furniture, for the proposed amount.

2. IF [*the employer*] abandon the intention of executing the blding, the sd
 [*architect*] shall be entitled to a sum to be fixed beforehand, and to the return of
 his sketches (*but see 6 and 12*).

3. IF the sketches are approved, with or without modifications, and the sd
 [*employer*] desires to proceed, the sd [*architect*] shall by a day to be named
 prepare working drawings and specifications for competition by blders.

(h) The number of the windows proposed to be opened should be inserted, with a more
 exact description of their size and position.

(i) The above was the substance of the Government arrangement, with suggestions by
 Lord Grimthorpe. See p. 26, *et seq.*, of his book on Building. For a form of agreement
 between a civil engineer and a local board, see *The Law Relating to Civil Engineers*, by
 Macasey and Strahan (1890), p. 28.

4. The drawings and specifications shall be full and complete so as to enable the *ad [employer]* to enter into a contract with a responsible bidder.

XLVII.

5. If the most approved tender exceeds the amount proposed, the *ad [architect]* shall, if required by the *ad [employer]*, revise his plans so as to bring the expenditure within the prescribed limit.

Agreement
with Archi-
tect.

6. The plans and the documents relating to the works shall be the property of the *ad [employer]* (*i.e.* at once, not merely after the work is done), and the *ad [architect]* shall make at his own expenso all copies of them necessary for the conduct of the works.

7 and 8 are merely formal as to certificates and clerk of the works.

9. The *ad [architect]* will be at liberty to vary architectural details, *provided such variations do not involve extra cost*, but shall on no account incur any increased expenditure without sanction of the *ad [employer]* in writing. (*k*)

10. If any additional or substituted works become necessary during the exco, the *ad [architect]* shall furnish the plans, etc., as soon as possible.

11. The *ad [architect's]* remuneron shall be a fixed sum to be agreed on beforehand; and one third of it shall be paid to him on the exco of the contract; another third when half the contract price has been pd to the bidder, and the rest when the last paymt has been made to the bidder.

12. If, after working drawings have been made, the *ad [employer]* does not proceed, the *ad [architect]* shall be entitled to a fixed sum to be agreed beforehand, and the plans, etc., shall belong to the *ad [employer]*. Or if the *ad [employer]* proceeds only with a part of the works the *ad [architect]* shall be entitled to a proportionate part of the remuneron mentd in 11 in addition to a proportionate part of the sum mentd in this article in respect to the works abandoned.

13. The *ad [architect]* shall be entitled to nothing more except for alterations and additions made by the written authority of the *ad [employer]*.

14. In that case he shall be entitled to such increased remuneron as may be agreed on, or determined by arbitration. (*l*)

15. If the *ad [architect]* becomes incapacitated or dies, he or his representatives shall hand over to the *ad [employer]* all plans and papers relating to the works, and shall be entitled to such equitable proportion of the unpaid part of the said remuneron as may be agreed on. (*m*)

16. Disputes to be settled by an arbitrator appointed by . (*l*)

17. No rules of the R.I.B.A. (*n*) or any other society to be held binding on the *ad [employer]*.

(*l*) See, as to this, *supra*, pp. 187, 188.

(*l*) It is better to omit the provision as to arbitration, and to state a fixed sum for this.

(*m*) The following is a more definite stipulation—

"If the architect dies or becomes incapacitated or ceases to be employed, he shall be entitled to whatever sum has been agreed on for the working drawings in case the work had been abandoned and also to 2½ per cent. on the value of the work executed under his superintendence, as I certified by him."

See, generally, as to death of architect, *Hall v. Wright*, E. B. & L. 705 and other cases cited, p. 73, *ante*.

(*n*) A provision should be inserted as to actual travelling expenses, if necessary.

XLVIII.

XLVIII.

Architectural Competitions. REGULATIONS for architectural competitions approved by the Royal Institute of British Architects. (o)

If the promoters of an intended competition desire members of the Royal Institute of British Architects to take part therein, the conditions should be based on the following suggestions :—

1. THE promoters of an intended competition should, AS THEIR FIRST STEP, appoint one or more professional assessors, architects of established reputation, whose appointment should be published in the original advertisements and instructions. The selection of an assessor should be made with the greatest possible care, as the successful result of the competition will depend very largely upon his experience and ability.

The president of the Royal Institute of British Architects is always prepared to act as honorary adviser to promoters in their appointment of assessors.

All the designs sent in should be submitted to the assessors.

2. THE duty of assessors should be, after conference with the promoters—

- (a) To draw up the particulars, conditions, and suggestions, in accordance with these regulations, as instructions to competitors, such documents to be so drawn up as to form an agreement between the promoters and the competitors, and also to advise the promoters upon the question of cost and the amount and apportionment of the premium or premiums.
- (b) to determine whether the designs conform to the instructions, and to exclude any which do not.
- (c) to advise the promoters on the relative merits of the designs admitted to the competition, and to make a selection in accordance with the instructions.

Note.—It is essential in drawing up the instructions to state definitely which of the conditions must be strictly adhered to, and which of them are merely optional or of a suggestive character.

3. No promoter of a competition, and no assessor engaged upon it, nor any employee of either, should compete, or act as architect, for the proposed work.

4. THE number, scale, and method of finishing of the required drawings should be distinctly set forth, and they should not be more in number, or to a larger scale, than necessary to clearly explain the design, and such drawings should be uniform in size, number, mode of colouring, and mounting. If the assessor advises that perspective drawings are desirable, it should be so stated.

5. COMPETITIONS should be conducted in one of the following ways :—

- (a) By advertisement, inviting architects willing to compete for the intended work to send in designs. The promoters, with the advice of the assessor or assessors, should make their selection from such designs. The author of the design awarded the first place should be employed to carry out the work.
- (b) By advertisement, inviting architects willing to compete for the intended work to send in their names by a given day; with such other information as the candidate may think likely to advance his claim to be admitted to the competition. From these names the promoters, with the advice of the assessor or assessors, should select a limited number to compete, and each competitor thus selected should receive a

specified sum for the preparation of his design. The author of the design awarded the first place should be employed to carry out the work.

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Architectural Competitions.

- (c) By personal invitation to a limited number of selected architects, to join in a competition for the intended work. Each competitor should receive a specified sum for the preparation of his design. The author of the design awarded the first place should be employed to carry out the work.

6. No design should bear any motto, device, or distinguishing mark : but all designs should be numbered by the promoters in order of receipt. Any attempt to influence the decision of the promoters, or of the assessor or assessors, should disqualify a competitor.

7. The author of the design placed first by the assessor or assessors should be employed to carry out the work, and he should be paid in accordance with the Schedule of Charges sanctioned and published by the Royal Institute. (p) If no instructions are given to him to proceed within twelve months from the date of selection, or if the proposed works are abandoned by the promoters, then the selected architect should receive payment for his services in connection with the preparation of the competition drawings of a sum equal to 1½ per cent. on the amount of the estimated expenditure. If the said author should be subsequently employed, the 1½ per cent. previously paid to him should merge in his ultimate commission.

8. In every case the amount of premium or remuneration for the competitive design should be fixed under the advice of the assessor or assessors.

9. Where a deposit is required for supplying the instructions, it should be returned on the receipt of a *bonâ fide* design ; or if the applicant declines to compete and returns the said instructions, within a month after the receipt of replies to competitor's questions. The deposit required should not exceed the sum of one guinea.

10. Each design should be accompanied by a declaration, signed by the competitor, stating that the design is his own personal work, and that the drawings have been prepared under his own supervision.

11. A design should be excluded from a competition—

- (a) if sent in after the period named (accidents in transit excepted);
- (b) if it does not substantially give the accommodation asked for;
- (c) if it exceeds the limits of site as shown on the plan issued by the promoters, the figured dimensions on which should be adhered to;
- (d) if the assessor or assessors should determine that its probable cost will exceed by 10 per cent. the outlay stated in the instructions, or the estimate of the competitor should no outlay be stated. If the assessor or assessors be of opinion that the outlay stated in the instructions is inadequate, he or they shall not be bound in the selection of a design by the amount named in such instructions, but the question of cost shall nevertheless be a material element in the consideration of the award;
- (e) if any of the other instructions are violated.

12. It is desirable that all designs and reports submitted in a competition, except any excluded under Clause 11, should, with the consent of their authors, be publicly exhibited after the award has been made, which award should be published at the time of exhibition.

(p) See p. 472, *post*.

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13. It is essential to the success of any competition that the promoters should agree in their instructions that the award of the assessor should be adhered to unless there is some valid objection to the employment of the author of the design placed first, as to which the assessor should be satisfied.

14. In the case of works of considerable magnitude it is desirable that three assessors should be appointed. As stated above, the president of the Institute is always ready to advise on this or other points.

* * *The usual R.I.B.A. Scale of Charges for Assessing Competitions is the sum of thirty guineas plus one-fifth per cent. upon the estimated cost of the proposed building.*

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Charges, etc., of Architects.

PROFESSIONAL PRACTICE AND CHARGES OF ARCHITECTS.

Schedule sanctioned by the Royal Institute of British Architects, confirmed at a General Conference of Architects of the United Kingdom, 1872, and revised by the Royal Institute, 1898.

Services covered by commission, which is usually 5 per cent.

1. THE usual remuneration for an architect's services, except as hereinafter mentioned, is a commission of 5 per cent. on the total cost of works (q) executed under his directions. Such total cost is to be valued as though executed by a builder with new materials. This commission is for the necessary preliminary conferences and sketches, approximate estimate when required (such, for instance, as may be obtained by cubing out the contents), the necessary general and detailed drawings and specifications, one set of tracings, duplicate specification, general superintendence of works, and examining and passing accounts, exclusive of measuring and making out extras and omissions.

Charges for services not included in the 5 per cent. commission.

2. THIS commission does not include the payment for services rendered in connection with negotiations relating to the site or premises, or in supplying drawings to ground or other landlords, or in surveying the site or premises and taking levels, making surveys and plans of buildings to be altered, making arrangements in respect of party-walls and rights of light, or for drawings for and correspondence with local and other authorities, or for services consequent on the failure of builders to carry out the works, or for services in connection with litigation or arbitration, or in the measurement and valuation of extras and omissions. For such services additional charges proportionate to the trouble involved and time spent are made. The clerk of the works should be appointed by the architect, his salary being paid by the client.

Circumstances justifying a higher rate of percentage.

3. IN all works of less cost than £1000, and in works requiring designs for furniture and fittings of buildings, or for their decoration with painting, mosaics, sculpture, stained glass, or other like works, and in cases of alterations and additions to buildings, 5 per cent. is not remunerative, and the architect's charge is regulated by special circumstances and conditions.

Repetition in some cases justifies a lower rate.

4. WHEN several distinct buildings, being repetitions of one design, are erected at the same time from a single specification and one set of drawings and under one contract, the usual commission is charged on the cost of one such building, and a modified arrangement made in respect to the others; but this arrangement does not apply to the reduplication of parts in one building undertaking, in which case the full commission is charged on the total cost.

Charge for plans and specifications only half the commission,

5. IF the architect should have drawn out the approved design, with plans, (r)

(q) As to the meaning of these words, see *Bank of New Zealand v. Simpson* (1900), A. C. 182, referred to *ante*, p. 72 n.

(r) As to propriety in plans, see *Gibbon v. Pease* (1905), 1 K. B. 810, noted, *ante*, p. 76.

elevation, sections, and specification, the charge is $2\frac{1}{2}$ per cent. upon the estimated cost. If he should have procured tenders in accordance with the instruction of his employer, the charge is $\frac{1}{2}$ per cent. in addition. Two and a half per cent. is charged upon any works originally included in the contract or tender, but subsequently omitted in execution. These charges are exclusive of the charge for taking out quantities. Preliminary sketches and interviews, where the drawings are not further proceeded with, are charged for according to the trouble involved and time expended. (s)

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of Architects.

adding $\frac{1}{2}$ per cent. if tenders are obtained; also for abandoned work.

6. SHOULD the client, having approved the design and after the contract drawings have been prepared, require material alterations to be made, whether before or after the contract has been entered into, an extra charge is made in proportion to the time occupied in such alterations.

Charge for material alterations of design, by time.

7. THE architect is entitled during the progress of the works to payment by instalments on account at the rate of 5 per cent. on the amount of the certificates when granted, or alternatively on the signing of the contract, to half the commission on the amount thereof, and the remainder by instalments during their progress.

Architect entitled to payments on account.

8. THE charge per day depends upon an architect's professional position, the minimum charge being three guineas.

The usual charge per day.

9. THE charge for taking a plan of an estate, laying it out, and arranging for building upon it is regulated by the time, skill, and trouble involved.

Estates.

10. FOR letting out on an estate the position of the proposed road or roads, taking levels, and preparing drawings for roads and sewers, applying for the sanction of local authorities, and supplying all necessary tracings for this purpose, the charge is 2 per cent. on the estimated cost. For subsequently preparing working drawings and specifications of roads and sewers, obtaining tenders, supplying one copy of drawings and specification to the contractor, superintending works, examining and passing accounts (exclusive of measuring and valuing extras and omissions), the charge is 4 per cent. on the cost of the works executed, in addition to the 2 per cent. previously mentioned.

11. FOR letting the several plots in ordinary cases the charge is a sum not exceeding a whole year's ground rent, but in respect of plots of great value a special arrangement must be made.

12. FOR approving plans submitted by the lessee, and for inspecting the buildings during their progress, so far as may be necessary to ensure the conditions being fulfilled, and certifying for lease, the charge is a percentage not exceeding $1\frac{1}{2}$ per cent. up to £5000, and above that by special arrangement.

13. FOR valuing freehold, copyhold or leasehold property the charge is—

Valuations.

(On £1000)	...	...	...	1 per cent.
Thence to £10,000	...	...	...	$\frac{1}{2}$ "
Above £10,000	...	...	...	$\frac{1}{3}$ " on residue.

In valuation for mortgage, if an advance is not made, one-third of the above scale. The minimum fee is three guineas.

14. FOR valuing and negotiating the settlement of claims under the Land

(s) This rule has been declared to be one of general application. See *Bhapham v. Everitt* (1900), *Times*, March 22, noted, ante, p. 72.

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Charges, etc.,
of Architects.

Clauses Consolidation Act or other Acts for the compulsory acquisition of property, the charge is on Ryde's Scale, (t) as follows :—

On Amount of Settlement, whether by Verdict, Award, or otherwise.

Amount.	Gs.	Amount.	Gs.	Amount.	Gs.	Amount.	Gs.	Amount.	Gs.
£		£		£		£		£	
100	5	1,600	21	4,000	33	6,400	45	8,800	57
200	7	1,800	22	4,200	34	6,600	46	9,000	58
300	9	2,000	23	4,400	35	6,800	47	9,200	59
400	11	2,200	24	4,600	36	7,000	48	9,400	60
500	13	2,400	25	4,800	37	7,200	49	9,600	61
600	14	2,600	26	5,000	38	7,400	50	9,800	62
700	15	2,800	27	5,200	39	7,600	51	10,000	63
800	16	3,000	28	5,400	40	7,800	52	11,000	68
900	17	3,200	29	5,600	41	8,000	53	12,000	73
1,000	18	3,400	30	5,800	42	8,200	54	14,000	83
1,200	19	3,600	31	6,000	43	8,400	55	16,000	93
1,400	20	3,800	32	6,200	44	8,600	56	18,000	103
								20,000	113

Beyond this Half-a-Guinea per cent.

The above scale is exclusive of attendances on juries or umpires, or at arbitrations, and also of expenses and preparation of plans.

Dilapidations.

15.

For estimating dilapidations and furnishing or checking a schedule of same, the charge is 5 per cent. on the estimate, but in no case less than two guineas. For services in connection with settlement of claim by arbitration or otherwise, extra charges are made, under Clause 8.

Sanitary reports.

16.

For inspecting, reporting, and advising on the sanitary condition of premises, the charge must depend on the nature and extent of the services rendered.

Travelling expenses.

17.

In all cases travelling and other out-of-pocket expenses are paid by the client in addition to the fees. If the work is at such a distance as to lead to an exceptional expenditure of time in travelling, an additional charge may be made under Clause 8.

Quantities.

18.

When an architect takes out and supplies to builders quantities on which to form estimates for executing his designs, he should do so with the concurrence of his client, and it is desirable that the architect should be paid by him rather than by the builder, the cost of such quantities not being included in the commission of 5 per cent.

L.

Submission to Arbitration.

L.

SUBMISSION BY AGREEMENT TO ARBITRATION. (u)

1.

AN AGREEMENT made this day of , between A. B. of , and C. D. of .

2.

WHAS disputes and differences have arisen and are still subsisting between

(t) As to Ryde's Scale, see cases noted at p. 13, ante.
(u) See Russell on Arbitration, 9th ed., p. 99, and see ante, p. 37. For a form of award by an umpire under a building contract, see Key and Elphinstone's Precedents (1904), Vol. I., p. 189. For a form of the commencement of an award under a clause referring future differences in a building contract, see Redman's Law of Arbitrations and Awards, 4th ed. (1903), p. 373. A form of award by an umpire under a clause for

the above-mentd parties [or state here the particular disputes]: IT IS HERBY AGRED by and betwn them to refer all disputes and matters in difference whatsoer betwn them [or state what is to be referred].

L.

Submission to Arbitration.

3. To the award, order, and final determinon of X. Y., of _____, Esq., Barrister-at-Law. (x)

Appointment of arbitrator.

4. So as the above-mentd arbitrator make and publish his award in writing, and signed by him, of and concerning the matters referred, ready to be delivered to the parties or to either of them.

Formal requisites of award.

5. On if they, or either of them, shall be dead before the making of the award, to their respecive personal representatives who shall require the same.

Death of party no revocation.

6. Or or before the _____ day of _____ next, or on or before any other day to which the arbitrator shall by any writing signed by him endorsed on this submission from time to time enlarge the time for making his award.

Duration—power to enlarge time.

7. AND it is further agreed that the costs of preparing and executing these presents and a duplicate hereof, and the costs of the reference and award, shall be in the discretion of the arbitrator who may direct to and by whom and in what manner the same, or any part thereof, shall be paid.

Power over costs.

8. AND that the witnesses on the reference and the parties (if examined) shall be examined on oath or affirmation.

Power to examine parties, &c.

9. AND that the arbitrator shall be at liberty to proceed *ex parte* in case either party, after reasonable notice, shall at any time neglect or refuse to attend on the reference without having previously shown to the said arbitrator what the latter shall consider good and sufficient cause for omitting to attend.

Power to proceed *ex parte*.

10. AND that the parties respectively shall produce before the arbitrator all books, deeds, papers, accounts, vouchers, writings, and documents within their possession or control, which the arbitrator may in his discretion require and call for relating to the matters referred.

Power to call for documents.

11. AND that the parties respectively shall do all other acts necessary to enable the arbitrator to make a just award, and that neither of them shall wilfully and wrongfully do, or cause to be done, any act to delay or prevent the arbitrator from making his award.

Parties to forward, not prevent award.

12. AND it is further agreed that the said parties, their executors and administrators, shall on their respective parts in all things stand to, obey, abide by, perform, fulfil, and keep the award so to be made and published as aforesaid.

Parties to abide by award.

reference of disputes in a contract to construct canals for a pier, making allowances for delay and damages for breach of warranty in respect of defective workmanship, will be found in the *Encyclopædia of Forms*, Vol. II., p. 103. For a form of agreement for reference to a single arbitrator of all differences under specific terms in a building agreement, see *ib.*

(x) If there are to be two arbitrators and an umpire, substitute the following:—

"To the award, order, final end, and determination of M. N. and O. P., arbitrators nominated by the sd A. B. and the sd C. D. respctly, and 'in case they shall not agree to the umpirage of R. S.' [or, 'in case they shall not agree to the award of such person as the sd arbitrators shall appoint as umpire'] [or in case they disagree about making an award or fail to make an award before the _____ day of _____, then to the award, umpirage, final end, and determination of such umpire as the sd arbitrators shall by writing under their hands endorsed on these presents before they enter upon the conduct of the matters referred nominate and appoint]"

L.

**Submission to
Arbitration.**

Parties not to
bring action
or suit.

Power to refer
back award.

13. AND that none of them shall bring or prosecute any action against the arbitrator, or against any other of them, concerning the matters referred.

14. AND it is further agreed that in the event of either of the parties, their executors or administrators, being dissatisfied with the award, or disputing its validity, and moving the Court to set the same, or any part thereof, aside, or on any motion being made respecting the said award, the said Court, whether the award be insufficient in law or not, shall have power if it shall think fit to remit the award or the matters hereby referred, or any of them, from time to time, to the reconsideration and determination of the said arbitrator.

In witness whereof the said parties have hereunto set their hands the day and year first above written.

WITNESS.

E. F.

A. B.

C. D.

PART III.

STATUTE LAW RELATING TO BUILDING.

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LONDON BUILDING ACT, 1894.

57 & 58 VICT. CH. CCXIII.

An Act to consolidate and amend the Enactments relating to Streets and Buildings in London.(a) [25th August, 1894.]

WHEREAS, ETC.

PART I.

INTRODUCTORY.

1. *Short Title.*—This Act may be cited as the London Building Act 1894.
2. *Division of Act into Parts.*—The Act shall be divided into parts as follows:—

(a) A contract for the erection of a building in contravention of the provisions of this Act cannot be enforced, *Stevens v. Gurnley*, 7 C. B. N. S. 99. See *Cluett v. Smith*, 11 L. T. N. S. 598.

Part I. Introductory. Part II. Formation and Widening of Streets. Part III. Lines of Building Frontage. Part IV. Naming and Numbering of Streets. Part V. Open Spaces about Buildings and Height of Buildings. Part VI. Construction of Buildings. Part VII. Special and Temporary Buildings and Wooden Structures. Part VIII. Rights of Building and Adjoining Owners. Part IX. Dangerous and Neglected Structures. Part X. Dangerous and Noxious Businesses. Part XI. Dwelling-houses on Low-lying Land. Part XII. Sky Signs. Part XIII. Superintending Architect and District Surveyors. Part XIV. Byelaws. Part XV. Legal Proceedings. Part XVI. Miscellaneous.

3. *Commencement of Act.*—This Act shall come into operation on and shall take effect from the first day of January next after the passing thereof which date is in this Act referred to as the commencement of this Act.

4. (b) *Extent of Act.*—This Act shall save so far as is otherwise provided extend to London (c) and no further:

Provided always that in addition to any exemption referring to the Commissioners of Sewers contained in this Act nothing in this Act contained shall in any way take away alter prejudice or affect any of the powers privileges exemptions jurisdictions or authorities given to or vested in the Commissioners of Sewers by or under any Act of Parliament and existing immediately before the passing of this Act notwithstanding the repeal of the Acts specified in the Fourth Schedule hereto.

5. (d) *Definitions.*—In this Act unless the context otherwise requires—

(1) (e) *Street.*—The expression “street” means and includes any highway and any road bridge lane mews footway square court alley passage whether a thoroughfare or not and a part of any such highway road bridge lane mews footway square court alley or passage.

(2) *Way.*—The expression “way” includes any public road way or footpath not being a street and any private road way or footpath which it is proposed to convert into a highway or to form lay out or adapt as a street.

(3) (f) *Roadway.*—The expression “roadway” in relation to any street or way means and includes the whole space open for traffic whether carriage traffic and foot traffic or foot traffic only.

(4) *Centre of roadway.*—The term “centre of the roadway” means—

(a) In relation to any street or way of which the centre of the roadway has been ascertained or defined by the Council or the superintending architect

(b) Re-enacting 18 & 19 Vict. c. 122, s. 4.

(c) Defined s. 5 (40).

(d) It will be observed that there is no definition of building in this clause; but it has been held that a structure of wood of considerable size (16 ft. by 13 ft.) and intended to be permanently used as a shop, is a building, although not let into the ground. *Stevens v. Gourley*, 7 C. B. N. S. 99.

The following have been held to be buildings: A timber stage of two storeys, the lower of which was fitted with revolving shutters, *Legg v. Smith* (North London P.C.), *Building News*, September 2, 1892; a timber stage of three floors used for storing cut timber, *Wallen v. Glückstein* (Marlborough Street P.C.), *Building News*, February 3, 1893. A wooden erection about 20 ft. by 20 ft. by 12 ft., to be used as a stable on private ground, was held to be a “new building” within the Public Health Act, 1875, *Mayor of South Shields v. Wilson* (1901), 84 L. T. 207. See also *Stroud’s Judicial Dictionary* (2nd ed.) (1903), *sub. tit.*, “Building.” Public buildings are, except as respects the rules of construction, deemed to be included in the term “building,” see s. 78, *post*, p. 512. As to the meaning of a “building” within s. 27 of 2 & 3 Will. IV. c. 45, see *Powell v. Farmer*, 34 L. J. C. P. 71; *Powell v. Boraston*, 34 L. J. C. P. 73; within the Factory Act, 1867, *Redgrave v. Lee*, 43 L. J. M. C. 105; *Bones v. Law*, 9 Eq. 636; *Morish v. Harris*, L. R. 1 C. P. 155.

(e) Re-enacting 18 & 19 Vict. c. 120, s. 250; 25 & 26 Vict. c. 102, s. 112. As to definition of “street,” see *Metropolis Management Acts*, 1855 and 1862, ss. 250 and 112 respectively. See also *Ellis v. L. C. C.* (No. 1.), 67 L. T. 558; *L. C. C. v. Mitchell*, 63 L. J. M. C. 104; *Armstrong v. L. C. C.* (1900), 1 Q. B. 416.

(f) Re-enacting 41 & 42 Vict. c. 32, s. 4; 53 & 54 Vict. c. cxxliii, s. 30.

previously to or after the commencement of this Act the centre of the roadway as ascertained or defined;

- (b) In relation to any street or way of which the centre of the roadway shall not have been ascertained or defined by the Council or the superintending architect where the roadway opposite the site of the building in question shall since July 22, 1878, have been widened the centre of the roadway as existing immediately before the date of such widening or where it shall not have been so widened the actual centre of the existing roadway:

For the purpose of any enactment in this Act referring to the centre of the roadway the superintending architect may at any time define the line constituting the centre of the roadway in the case of a street formed or laid out after August 18, 1890, and the line so defined shall continue to be deemed the centre for such purpose notwithstanding that the actual centre of the roadway may have become altered by reason of the roadway having been widened either on one side only or on both sides to an unequal extent.

- (5) *Prescribed distance.*—The expression "the prescribed distance" (g) means twenty feet from the centre of the roadway where such roadway is used for the purpose of carriage traffic and ten feet from the centre of the roadway where such roadway is used for the purpose of foot traffic only.

- (6) *New building.*—The expression "new building" (h) means and include—

Any building erected after the commencement of this Act;

Any building which has been taken down for more than one half of its cubical extent and re-erected or commenced to be re-erected wholly or partially on the same site after the commencement of this Act; (i)

(k) Any space between walls and buildings which is roofed or commenced to be roofed after the commencement of this Act.

- (7) *Bressummer.*—The expression "bressummer" means a wooden beam or metallic girder which carries a wall.

- (8) *Level of the ground.*—The expression "level of the ground" means the mean level of the ground as determined by the district surveyor, or, in the event of disagreement by the superintending architect or on appeal by the Tribunal of appeal. (l)

- (9) *Foundation.*—The expression "foundation" applied to a wall having footings means the solid ground or artificially formed support on which

(g) Re-enacting 41 & 42 Vict. c. 32, s. 4. See s. 4 of the Amendment Act, 1898; and see also s. 202 of the Metropolis Management Act, 1855, *post*, p. 585.

(A) As to the meaning of "building," see note (d) to s. 5, p. 476, *supra*. The old definition was in ss. 8, 9, and 10 of the Building Act, 1855. As to buildings in course of erection at commencement of Act, see s. 212. See the following cases on the old sections, *Tear v. Freebody*, 10 C. B. N. S. 229; *North Kent Ry. Co. v. Badger*, 8 El. & El. 728; *Badger v. Dunn*, 22 J. P. 109; *Street v. Towner*, 29 L. J. C. P. 1. See *Hobbs v. Dancer*, L. R. 9 C. P. 30, as to stables pulled down and re-erected with the same materials; *Poplar Bd. of Wks. v. Knott*, 28 L. J. M. C. 37, as to houses with out foundations.

As to the meaning of the term "new building," see *Richardson v. Brown*, 49 J. P. 661; *Southern Ry. Co. v. Tocher* (1901), 70 L. J. K. B. 328, p. 629, *post*; and *South Shields Corp. v. Wilson & Sons*, 81 L. T. 267, case decided under the Public Health Act, 1875.

Alterations and additions to existing buildings are to be subject to the provisions of the Act and byelaws thereunder relating to new buildings, s. 209.

As to the meaning of "new building" under the London Building Acts (Am.) Act, 1905, see s. 6 (b) of that Act.

The question whether a building is or is not a new building must be left to the discretion of each judge or decide for himself, *Jones v. Hyatt*, 51 L. T. 337. The same observation applies to the word "structure," *Cosser v. M'Farlane* (1877), 14 Q. B. at pp. 427, 429.

(i) This paragraph does not regulate the construction of the external and party walls of a building. These are dealt with in s. 288, *Crane v. Rothwell*, 59 J. P. 551, 603. See also *Redruth Brewery Co. v. Redruth D. C.*, 69 J. P. 78.

(k) See *Clarke v. St. Pancras Vestry*, 4 J. P. 181.

(l) As to appeals to the Tribunal of Appeal, see s. 184, *post*.

(m) Re-enacting 41 & 42 Vict. c. 32, s. 14. This sub-section nullifies the effect of the decision in *Blackall v. Chambers*, 14 Q. B. D. 479.

the footings of the wall rest but in the case of a wall carried by a bressummer means such bressummer.

- (10) (*n*) *Base*.]—The expression “base” applied to a wall means the underside of the course immediately above the footings if any or in the case of a wall carried by a bressummer above such bressummer.
- (11) *Ground storey*.]—The expression “ground storey” means that storey of a building to which there is an entrance from the outside on or near the level of the ground and where there are two such storeys then the lower of the two:

Provided that no storey of which the upper surface of the floor is more than four feet below the level of the adjoining pavement shall be deemed to be the ground storey.

- (12) *Basement storey*.]—The expression “basement storey” means any storey of a building which is under the ground storey.
- (13) *First &c. storey*.]—The expression “first storey” means that storey of a building which is next above the ground storey the successive storeys above the first storey being the second storey the third storey and so on to the topmost storey.
- (14) *Topmost storey*.]—The expression “topmost storey” (*o*) means the uppermost storey in a building whether constructed wholly or partly in the roof or not.

- (15) *External wall*.]—The expression “external wall” (*p*) means an outer wall or vertical enclosure of any building not being a party wall.

- (16) *Party wall*.]—The expression “party wall” (*q*) means—

(*a*) A wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners or occupied or constructed or adapted to be occupied by different persons; or

(*b*) A wall forming part of a building and standing to a greater extent than the projection of the footings on lands of different owners.

- (17) (*r*) *Cross wall*.]—The expression “cross wall” means a wall used or constructed to be used in any part of its height as an inner wall of a building for separation of one part from another part of the building that building being wholly in or being constructed or adapted to be wholly in one occupation.

- (18) *Party fence wall*.]—The expression “party fence wall” (*s*) means a wall used or constructed to be used as a separation of adjoining lands of different owners (*t*) and standing on lands of different owners and not being part of a building but does not include a wall constructed on the land of one owner the footings of which project into the land of another owner.

- (19) *Party arch*.]—The expression “party arch” (*u*) means an arch separating adjoining building, storeys, or rooms belonging to different owners or

(*n*) Re-enacting 18 & 19 Vict. c. 122, s. 3.

(*o*) As to “topmost storey,” see *Foot v Hodjson*, 25 Q. B. D. 160. The expression “upper storey” is defined by the Amendment Act, 1905, s. 6 (1) (iii.), *post*, p. 560.

(*p*) Re-enacting 18 & 19 Vict. c. 122, s. 3. See *Green v. Eales*, 2 Q. B. 225, as to meaning of “external wall” in a covenant to repair. For provisions relating to the pulling down and re-erection of an external wall, see s. 208. As to setting back external walls, see Amendment Act, 1898, s. 3 (1).

(*q*) Re-enacting 18 & 19 Vict. c. 122, s. 3. See *Knight v. Purcell*, 11 Ch. D. 412. See also, as to pulling down and re-erection of a party wall which is not in conformity with the Act, s. 208, *post*; and see also the cases, *ante*, p. 318, Chap. XXIV., as to party walls. See *Drury v. Army and Navy Stores* (1896), 2 Q. B. 271, and in the note to s. 75, *post*.

(*r*) Re-enacting 18 & 19 Vict. c. 122, s. 3. As to thickness of cross walls, see Sched. I., Misc. Rules 1 and 2, *post*.

(*s*) This is new. See *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508. Party fence walls not exceeding 7 ft. in height are exempt from the operation of Parts VI. and VII. of the Act. See s. 201, *post*.

(*t*) As to footings on land of different owners, see s. 87 (*ii*), *post*.

(*u*) In the old Act this was included under party structure.

occupied or constructed or adapted to be occupied by different persons or separating a building from a public way or a private way leading to premises in other occupation.

- (20) (*w*) *Party structure.*]—The expression "party structure" means a party wall and also a partition floor or other structure separating vertically or horizontally (a) buildings storeys or rooms approached by distinct staircases or separate entrances from without, (y)
- (21) (*z*) *Height.*]—The expression "height" in relation to any building means the measurement taken from the level of the footway (if any) immediately in front of the centre of the face of the building or (where there is no such footway) from the level of the ground before excavation to the level of the top of the parapet or where there is no parapet to the level of the top of the external wall or (in the case of gabled buildings) to the base of the gable.
- (22) (*u*) *Area.*]—The expression "area" applied to a building means the superficies of a horizontal section thereof made at the point of its greatest surface inclusive of the external walls and of such portions of the party walls as belong to the building.
- (23) *Square.*]—The expression "square" applied to the measurement of the area of a building means the space of 100 superficial feet.
- (24) *Cubical extent.*]—The expression "cubical extent" applied to the measurement of a building means the space contained within the external surfaces of its walls and roof and the upper surfaces of the floor of its lowest storey.
- (25) *Dwelling-house.*]—The expression "dwelling-house" means a building used or constructed or adapted to be used wholly or principally for human habitation.
- (26) *Domestic Building.*]—The expression "domestic building" (a) includes a dwelling-house and any other building not being a public building or of the warehouse class.
- (27) *Public Building.*]—The expression "public building" (b) means a building used or constructed or adapted to be used as a church chapel or other place of public worship
or as a school college or place of instruction (not being merely a dwelling-house so used);
or as a hospital workhouse public theatre public hall public concert-room public ball-room public lecture-room public library or public exhibition-room;
or as a public place of assembly or used or constructed or adapted to be used for any other public purpose also a building used or constructed or adapted to be used as an hotel lodging-house homo refuge or shelter where such building extends to more than 250,000 cubic feet or has sleeping accommodation for more than one hundred persons. (c)
- (28) (*d*) *Building of the warehouse class.*]—The expression "building of the

(w) Re-enacting 18 & 19 Vict. c. 122, s. 3.]

(x) See *H. v. W.*, 70 L. T. 376, a decision that a *fire* roof floor is not a party wall, which is now met by these new words, "vertically or horizontally."

(y) A metropolitan police magistrate has decided that these words mean a "separate entrance from without each individual tenement, not necessarily from without the building." *Marsland v. Frampton* (1905), *Buller*, May 6, p. 501.

(z) As to the height of a storey for the purposes of the Amendment Act, 1905, see s. 6 (1) (i.) of that Act, *post*, p. 500. As to the meaning of the expression "exceeds 30 feet in height," which occurs in s. 7 (1) of the Workmen's Compensation Act, 1897, see *Hillings v. H.* (1899), 1 Q. B. 70; *Knight v. Cubitt* (1902), 1 K. B. 31.

(a) See also s. 39, *post*.

(b) See *R. v. Carruthers*, 1 B. & S. 814; and see *L. C. v. Davis and Roston House*, 77 L. T. 3.

(c) See *Moses v. Marsland* (1901), 1 K. B. 608; *J. v. M.*, 53 L. T. 319.

The buildings of the Stock Exchange are "public buildings" within the meaning of this Act. See Amendment Act, 1894, s. 8.

(d) Re-enacting 18 & 19 Vict. c. 122, Sched. I, Part II, Rule 1.

warehouse class" means a warehouse factory manufacturing brewery or distillery and any other building exceeding in cubical extent 150,000 cubic feet which is neither a public building nor a domestic building.

- (29) *Owner*.]—The expression "owner" (e) shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement or in the occupation of any land or tenement otherwise than as a tenant from year to year or for any less term or as a tenant at will.
- (30) *Occupier*.]—The expression "occupier" does not include a lodger and "occupy" and "occupation" do not refer to occupation by a lodger.
- (31) (f) *Building owner*.]—The expression "building owner" means such one of the owners of adjoining land as is desirous of building or such one of the owners of buildings storeys or rooms separated from one another by a party wall or party structure as does or is desirous of doing a work affecting that party wall or party structure.
- (32) (f) *Adjoining owner*.]—The expression "adjoining owner" means the owner or one of the owners and "adjoining occupier" (g) means the occupier or one of the occupiers of land buildings storeys or rooms adjoining those of the building owner. (h)
- (33) (i) *Builder*.]—The expression "builder" means the person who is employed

(e) This re-enacts the old definition in s. 3 of the Act of 1855. The following cases were decided under the old Act:—

A peppercorn rent is not within the meaning of the words in this interpretation clause, and therefore the owner in fee simple who lets land on a building lease at a peppercorn rent is not liable. *Evelyn v. Whitehead*, El. B. & El. 126. See also in *Caudwell v. Hanson*, L. R. 7 Q. B. 55.

A tenant in possession having an equitable interest only under an agreement for a lease, is an owner. *Coven v. Phillips*, 33 Beav. 18.

So also is a lessee for a term of ninety-nine years who has demised some portions to separate persons for terms varying from seven to twenty-one years. *Hunt v. Harris*, 19 C. B. N. S. 13.

So is the lessee of a chapel for twenty-one years, *R. v. Mourilyan*, 3 L. T. N. S. 668; and so is a tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year. *Fillingham v. Wood*, [1891] 1 Ch. 51. In such case service of notice on the person in receipt of the whole of the rents of the tenement is not sufficient. *Id.*

A lessee not in possession, but who has sublet, is not an "owner." *Wigg v. Lefevre*, 8 T. L. R. 493. Nor is a person who has entered into an agreement for a lease under which he agrees to be tenant at will until the execution of the lease. *Orf v. Payton*, 69 J. P. 103. See also *List v. Tharp* (1897), 1 Ch. 260, and in the note to s. 90, *post*.

See *Wheeler v. Gray*, 6 C. B. N. S. 606, as to a tenant from year to year not being owner; and see *Bowditch v. Wakefield L. Bd.*, L. R. 6 Q. B. 567 (followed, on this point, in *Hornsey U. D. C. v. Smith* (1897), 1 Ch. 843), as to a trustee of a school; *Angell v. Paddington Vestry*, L. R. 3 Q. B. 714, as to commissioners for building a church; *Plumstead Bd. of W. v. British Land Co.*, L. R. 10 Q. B. 200, as to a land company; *Wright v. Ingle*, 16 Q. B. D. 379, as to churches and chapels generally.

See *Holland v. Kensington Vestry*, L. R. 2 C. P. 565, as to an agreement with a builder by the owner in fee of land, who covenanted to grant leases of the houses when finished, where the latter was held to be "owner." But see the later case of *Poplar Bd. v. Love*, 29 L. T. N. S. 915, where the builder was held to be owner. And see *Mayor of St. Helens v. Riley*, 47 J. P. 471, as to meaning of owner in a private Act.

The definitions given by the Metropolis Management Act, 1855, and the Public Health Acts, 1875 and 1891, are similar, though not the same. The expression "owner" where used in the Amendment Act, 1905, has a special meaning, except in relation to the liability to pay fees to district surveyors under s. 18 of that Act. See Amendment Act, 1905, s. 6 (1) (i.). It also has a special meaning under s. 15 of this Act, *post*, p. 487, and under s. 173, *post*, p. 535.

(f) Re-enacting 18 & 19 Vict. c. 122, s. 82. See Pt. VIII., *post*.

(g) See s. 90, *post*.

(h) In a covenant by a lessor not to allow a certain trade to be carried on in the "adjoining premises," the word "adjoining" was confined to the two houses on either side of the demised premises, although the lessor was at the time of the lease the owner of a block of buildings of which these formed part only; *Vale v. Moorgate, etc., Buildings*, 80 L. T. 487. In *White v. Harrow* (1902), 86 L. T. 4, it was held that adjoining premises did not extend to any buildings which were situated near enough to affect materially the demised premises by obstructing easements, but only to buildings which came into physical contact with the demised building.

(i) 18 & 19 Vict. c. 122, s. 3.

to build or to execute work on a building or structure or where no person is so employed the owner of the building or structure.

- (34) *(k) Superintending architect.*—The expression "superintending architect" means the superintending architect of metropolitan buildings for the time being.
- (35) *(l) District surveyor.*—The expression "district surveyor" means every such surveyor who is appointed in pursuance of this Act or whose appointment is hereby confirmed and shall include any deputy or assistant surveyor appointed under this Act.
- (36) *(m) Fire-resisting in test.*—The expression "fire-resisting material" means any of the materials and things described in the Second Schedule to the Act.
- (37) *Inhabited.*—The expression "inhabited" applied to a room means a room in which some person passes the night or which is used as a living room including a room with respect to which there is a probable presumption (until the contrary is shown) that some person passes the night therein or that it is used as a living room.
- (38) *Habitable.*—The expression "habitable" applied to a room means a room constructed or adapted to be inhabited.
- (39) *Metropolis Management Acts.*—The expression "the Metropolis Management Acts" means the Metropolis Management Act 1855 and the Acts amending the same or any one or more of those Acts, (n)
- (40) *London.*—The expression "London" means the administrative county of London, (o)
- (41) *Council.*—The expression "the Council" means the London County Council.
- (42) *Local authority.*—The expression "local authority" means the vestry or district board of works under the Metropolis Management Acts within whose parish or district the building structure place land or thing referred to is or will be or in the City the Commissioners of Sewers or in the parish of Woolwich the Woolwich Local Board of Health, (p)
- (43) *City.*—The expression "the City" means all parts now within the jurisdiction of the Commissioners of Sewers.
- (44) *Corporation.*—The expression "Corporation" means the mayor aldermen and commons of the City of London.
- (45) *Guildhall.*—The expression "Guildhall" means the land offices courts and buildings commonly called the Guildhall and the offices courts and buildings adjoining or appurtenant thereto which now are used by or may hereafter be erected for the use of the Corporation or of any committee commission or society appointed by them.
- (46) *Commissioners of Sewers.*—The expression "Commissioners of Sewers" means the Commissioners of Sewers of the City of London, (q)
- (47) *Tribunal of appeal.*—The expression "the tribunal of appeal" means the tribunal of appeal constituted by this Act, (r)

(l) 18 & 19 Vict. c. 122, s. 62. See s. 136, *post*, as to his appointment.

(m) 18 & 19 Vict. c. 122, s. 3. See ss. 139-143.

(n) This sub-section is repealed by the Amendment Act, 1905, Sched. III. Sched. I. of that Act contains a list of materials which are to be regarded as fire-resisting for the purposes of the London Building Acts, 1891-1905. The expression "fire-resisting" is a word of art; it does not mean "incombustible."

(o) The Metropolis Management Acts, 1855-1890, are defined by the Short Titles Acts, 1892, s. 1 (2), and Sched. II.

(p) By the London Local Government Act, 1890 (52 & 63 Vict. c. 14), Penge and the detached portions of Clerkenwell and Wandsworth have been excluded from, and South Hornsey has been included in, the County of London. By the same Act (s. 1 and Sched. I.) the administrative county is divided into the City and twenty-eight other boroughs.

(q) The administrative county is defined by s. 10 (1) of the Local Government Act, 1888. By the London Government Act, 1899, s. 1, vestries and district boards in the County of London were abolished, and their powers and duties were transferred to the borough councils.

(r) By the City of London Sewers Act, 1897, s. 7, the powers and duties of the Commissioners of Sewers were transferred to the Common Council.

(s) See s. 175, *post*.

PART II. (s)

FORMATION AND WIDENING OF STREETS.

6. *As to making streets.*—From and after the commencement of this Act streets shall not be made and ways shall not be widened altered or adapted so as to form streets otherwise than subject to and in accordance with the provisions set forth in this Part of this Act. Provided that this Act shall not affect the powers of any local authority to widen alter or improve any street. (t)

7. (u) *Sanction to formation of new streets.*—Before any person commences to form or lay out any street (w) whether intended to be used for carriage traffic or for foot traffic only (x) such person shall make an application in writing to the Council for their sanction to the formation or laying out of such street either for carriage traffic or for foot traffic (as the case may be):

Every such application shall be accompanied by plans and sections with such particulars in relation thereto as may be required by printed regulations issued by the Council (y) and the Council shall forthwith communicate every such application to the local authority:

And no person shall commence to form or lay out any street for carriage traffic or for foot traffic without having obtained the sanction of the Council.

8. (z) *Evidence of commencement of street.*—For the purposes of this Part of this Act a person shall be deemed to commence to form or lay out a street if he erect a fence or other boundary or lay down lines of kerbing or level the surface of the ground so as to define the course or direction of a street or if he form the foundations of a house in such manner and in such position as that such house will or may become one of three or more houses abutting on or erected beside land on which a street is intended to be or may be thereafter laid out or formed

Provided that no person shall be deemed to commence to form or lay out a street if he do any of the acts in this section mentioned for some purpose other than that of forming or laying out a street. (a)

9. (b) *Grounds for refusal to sanction plans of street.*—In any of the cases following but in no other case (that is to say):—

- (1) Where any street is proposed to be formed or laid out for carriage traffic without being of or being widened to the full width of forty feet clear or such other width as may be required (c) under the provisions of this Act;

(s) This part gives a new code of regulations as to the formation of streets, and as the expression "new street" is not now used, it may be hoped that the difficulties which formerly arose in defining it will be avoided. As to subsoil of new streets, see *Metropolis Management Act, 1890, post*, p. 606.

(t) The penalty for breach of this section is contained in s. 200, *post*, p. 540.

(u) Re-enacting 45 & 46 Vict. c. 14, s. 7.

(w) The question whether a place is a "street" is one largely of fact, *Armstrong v. L. C. C.* (1900), 1 Q. B. 416, overruling *Wood v. L. C. C.*, 64 L. J. M. C. 276, where it was said to be a question of law. This being the law, it is impossible to lay down any general rule for the determination of the question whether a place is a street.

(x) See *Metropolitan Bd. of W. v. Nathan*, 54 L. T. 423; 34 W. R. 164; 50 J. P. 503. The old law was contained in the Act of 1882.

(y) See § 11. (1) of the current regulations, *post*, p. 647.

(z) This section is new. As to buildings abutting at the rear, see *Metropolitan Bd. of W. v. Cor*, 19 C. B. N. S. 445.

(a) For an illustration of a purpose "other than that of forming or laying out a street," see *L. C. C. v. Dixon* (1899), 1 Q. B. 496. See also *L. C. C. v. Davis* (No. 2), 91 L. T. 555; *L. C. C. v. King*, 69 J. P. 406.

(b) Re-enacting 25 & 26 Vict. c. 102, s. 98; 45 & 46 Vict. c. 14, ss. 8, 26; 53 & 54 Vict. c. cxliii. s. 35.

(c) "Such other width as may be required," see s. 12, *post*.

- (2) Where any street is proposed to be formed or laid out for foot traffic only without being of or being widened to the full width of twenty feet clear;
- (3) Where any street exceeding sixty feet in length or any street not exceeding sixty feet in length of which the length is greater than the width is proposed to be formed or laid out without being open at both ends from the ground upwards; (d)
- (4) Where any street not being within the City is proposed to be formed or laid out in such manner that such street will not at and from the time of forming and laying out the same afford direct communication between two streets such two streets being (where it is intended to form or lay out such street for carriage traffic) streets formed and laid out for carriage traffic; (e)
- (5) Where it is proposed to form or lay out any street not being within the City for foot traffic only and it appears to the Council that such street should not be formed or laid out for foot traffic only or that such street should be formed or laid out for foot traffic only subject to conditions;
- (6) Where the street is proposed to be formed or laid out for carriage traffic with any gradient steeper than one in twenty;
- (7) Where it is proposed to form or lay out any street in such manner as to be in contravention of any byelaw of the Council;

it shall be lawful for the Council by order (f) at any time within the period of two months (g) after the receipt of the application to refuse to sanction or to sanction subject to such conditions (h) as they may by such order prescribe the formation or laying out of such street for carriage traffic or for foot traffic only as the case may be provided that the Council shall within such period give notice to the applicant of such order stating fully all their reasons for such refusal or the imposition of such conditions as the case may be:

Provided that if within the said period of two months the Council fail to give notice of their refusal to sanction the formation or laying out of such street or of their disapproval of any such plan or section they shall be deemed to have given their sanction thereto.

10. (i) *Adaptation of ways for streets.*—(1) Before any person commences—

- (a) To adapt for carriage traffic any street or way (k) not previously so adapted or to use or permit to be used for carriage traffic any street or way not previously so adapted;
- (b) To adapt as a street for foot traffic only or as a public footway any way not previously so adapted;

such person shall make an application in writing to the Council for their sanction thereto, and such application shall be accompanied by plans and sections and such particulars in relation thereto as may be required by printed regulations issued by the Council (l) and the Council shall forthwith communicate every such application to the local authority and no person shall commence to execute any such work without having obtained the sanction of the Council.

(d) See *Metcalf v. L. C. C.*, 56 L. J. M. C. 112; *L. C. C. v. Ebbw Vale*, 66 L. T. 200; *L. C. C. v. Dares*, 61 L. J. M. C. 212. A new street may communicate at both ends with the same existing public carriage-way, and comply with s. 35 of the L. C. C. (General Powers) Act, 1890. *L. C. C. v. Ebbw Vale & Co.*, 66 L. T. 260. See also *Widdham v. L. C. C.* (1898), 1 Q. B. 663.

(e) See *L. C. C. v. Ebbw Vale*, 66 L. T. 200; *L. C. C. v. Dares*, 61 L. J. M. C. 212. A new street may communicate at both ends with the same existing public carriage-way, and comply with s. 35 of the L. C. C. (General Powers) Act, 1890. *L. C. C. v. Ebbw Vale & Co.*, 66 L. T. 260. See also *Widdham v. L. C. C.* (1898), 1 Q. B. 663.

(f) This order must be under seal. See s. 187, *post*.

(g) If this period expires on some day between August 8 and September 14, it is deemed to be extended for twenty-eight days. See s. 171, *post*.

(h) As to whether the Court can adjudicate upon the reasonableness of the conditions, see *L. C. C. v. West*, 9 T. L. R. 429. See also *L. C. C. v. Chiswick*, 49 J. P. 401. For power to impose conditions, see s. 190, *post*, p. 540.

(i) Re-enacting 11 & 12 Vict. c. 24, ss. 9, 10; 5 & 54 Vict. c. cxxiii, s. 35. For penalties, see s. 260, *post*, p. 540.

(k) See definition, s. 3 (1), (2), *ante*.

(l) See § 11. (1) of the current regulations, *post*, p. 647.

(2) Within two months (*m*) after the receipt of any such application the Council shall either sanction the plans and sections or give notice to the applicant of their disapproval thereof stating fully all their reasons for such disapproval. Provided that if within the said period of two months (*m*) the Council fail to give notice of their disapproval of any such plan or section they shall be deemed to have given their sanction thereto.

(3) A person shall be deemed for the purposes of this Part of this Act to commence to execute a work within the meaning of this section

if he erect a fence or other boundary or lay down lines of kerbing or level the surface of the ground so as to define the course or direction of a work within the meaning of this section or

if he form the foundations of a house in such manner and in such position as that such house will or may become one of three or more houses abutting on or erected beside land on which a street is intended to be or may be thereafter laid out or formed

Provided that no person shall be deemed to commence to execute a work within the meaning of this section if he do any of the acts in this sub-section mentioned for some purpose other than that of executing a work within the meaning of this section.

(4) Before any person commences to widen on either side to a less extent than the prescribed distance any part of a street or way which (being adapted for carriage traffic) is less than forty feet in width or (being adapted for foot traffic only) is less than twenty feet in width he shall give notice in writing to the Council accompanied by a plan showing the extent of the proposed widening and no person shall commence to execute any such widening until after the expiration of two months from the date of such notice unless with the previous sanction of the Council.

11. (*n*). *Grounds for refusing to sanction adaptation of ways for streets.*—In any of the cases following but in no other case (that is to say):—

- (1) Whenever it is proposed to adapt for carriage traffic any street or way (not previously so adapted) where there are houses or buildings either on both sides thereof or only on one side thereof without a distance of at least twenty feet clear being left between the centre of the roadway and the nearest external wall of the houses or buildings on the side of the street or way to which the measurement is taken or (if there be forecourts or other spaces left between such external wall and the roadway) without there being a distance of at least twenty feet clear between the centre of the roadway and the external fences or boundaries of such forecourts or other spaces;
- (2) Where it is proposed to adapt as a street for foot traffic only or as a public footway any way not previously so adapted without the same being of or being widened to the full width of twenty feet clear measured as aforesaid;
- (3) Where any such adaptation would result in the formation of a street exceeding sixty feet in length or a street not exceeding sixty feet in length of which the length is greater than the width and in either case not being open at both ends from the ground upwards;
- (4) Where any such adaptation would result in the formation of a street not being within the City and not affording direct communication between two streets such two streets being (where it is intended to form or lay out such street for carriage traffic) streets formed and laid out for carriage traffic;
- (5) Where the adaptation will result in the formation or laying out of a street not being within the City for foot traffic only and it appears to the Council either that such street should not be formed or laid out for foot traffic only or that such street should be formed or laid out for foot traffic only subject to conditions;

(*m*) If this period expires on some day between August 8 and September 14, it is deemed to be extended for twenty-eight days. See s. 174, *post*.

(*n*) Re-enacting 41 & 42 Vict. c. 32, s. 10.

(6) Where the adaptation would result in the formation of a street for carriage traffic with any gradient steeper than one in twenty;

(7) Where the adaptation is proposed to be made in such a manner as to be in contravention of any byelaw of the Council;

it shall be lawful for the Council (o) by order at any time within the said period of two months (p) after the receipt of the application to refuse to sanction or to sanction (subject to such conditions as they may by such order prescribe) the adaptation proposed by the application.

Provided that the Council shall within such period give notice to the applicant of such order stating fully all their reasons for such refusal or the imposition of such conditions as the case may be.

Provided also that if within the said period of two months the Council fail to give notice of their refusal to sanction such adaptation or of their sanction of the adaptation subject to conditions they shall be deemed to have given their sanction thereto.

12. [Greater width (not exceeding 60 feet) of street may be required in certain cases.]

13.(7) (1) *Position of new buildings with reference to streets.*—No person shall erect any new building (r) or new structure or any part thereof or extend any building or structure or any part thereof in such manner that any external wall of any such building or structure or (if there be a forecourt or other space between such external wall and the roadway) any part of the external fence or boundary of such forecourt or other space shall without the consent (s) in writing of the Council be in any direction at a distance less than the prescribed distance (t) from the centre of the roadway of any street or way (being a highway). (u)

(2) Where the Council after consulting the local authority shall deem it expedient in the public interest either by reason of the length or importance of the street or way or by reason of the street or way forming or being so situate as to be likely to form part of an important line of communication or for other sufficient reason that the prescribed distance (t) from the centre of the roadway of any such street or way should where such roadway is used for the purpose of carriage traffic be greater than twenty feet it shall be lawful for the Council to determine that the prescribed distance shall be such greater distance not exceeding thirty feet from the centre of the roadway of such street or way on either side or both sides as the Council shall see fit to determine. (w)

This sub-section shall not apply to any street or way within two miles of Saint Paul's Cathedral.

(3) In case the person intending to erect form or extend any such building structure forecourt or space shall be dissatisfied with the determination of the Council that the prescribed distance shall be greater than twenty feet from the

(1) For power to impose conditions, see s. 150, *post*, p. 539.

(p) If this period expires on some day between August 8 and September 11, it is deemed to be extended for twenty-eight days. See s. 174, *post*.

(r) Re-enacting 41 & 42 Vict. c. 32, s. 1; 53 & 54 Vict. c. cxxiii. s. 34. For penalty, see s. 28a, *post*, p. 540. As to applications under the section, see the Regulations of the Council (November 2, 1894), § 11. (2).

(s) See p. 477, *ante*.

(t) As to consent, see note to s.s. (1), *post*.

(u) See definition, s. 5 (3), *ante*. And as to the meaning of the phrase in connection with houses of the working classes, see *proviso* to s.s. (5), *post*, and note thereto.

(v) As to the liability of a gas company erecting a building upon lands specified in their private act, see *L. C. v. Ilford & Portney Gas Co.*, 82 L. T. 562. See also cases there cited. As to a building erected on a corner site, it was held that the corresponding section of the Metropolitan Management and Building Act, 1878, applied to the flank as well as the front wall, and that the flank fence must be set back to the prescribed distance: *L. C. v. Pollock* (Woolwich Police Court), *Bulder*, February 20, 1892. See also *Uckfield R. D. C. v. Crowborough Dist. Water Co.* (1899), 2 Q. B. 604.

(w) As to compensation, see s. 15, *post*, p. 487.

centre of the roadway he may appeal to the tribunal of appeal against such determination of the Council. (x)

(4) The Council may in any case where they think it expedient consent (y) to the erection formation or extension of any building structure forecourt or space at a distance less than the prescribed distance (z) from the centre of the roadway of any such street or way and at such distance from the centre of such roadway and subject to such conditions and terms (if any) as they may think proper to sanction

Provided that the giving of such consent by the Council shall not in any way affect any rights of the owners of adjoining land. Before giving such consent the Council shall communicate to the local authority their intention to give the same. Any person dissatisfied with the determination of the Council under this sub-section may appeal to the tribunal of appeal. (a)

(5) (b) Provided that where any person intends to alter or re-erect (c) a building or structure existing either at the commencement of this Act or at any time within seven years previously and which shall not be or shall not have been in conformity with the provisions of this section relating to new buildings and structures such person may cause to be prepared plans (d) showing the extent of such building or structure (or in the event of such building or structure having ceased to exist before the commencement of this Act or having been accidentally destroyed the best plans available under all the circumstances of the case) and the extent of the forecourt or other open space (if any) between any external wall of such building or structure and the roadway and may cause such plans to be submitted to the district surveyor who shall (if reasonably satisfied with the evidence of their accuracy) certify the same under his hand and such certificate shall be taken to be conclusive evidence of the correctness of the plans

Thereupon it shall be lawful for such person to alter or re-erect such building or structure but so that no land within the prescribed distance shall be occupied by the re-erected building or structure or the forecourt or such other open space as aforesaid (if any) except that which was occupied within the prescribed distance by the previously existing building structure forecourt or open space :

If such person should fail to submit such plans to the district surveyor or the district surveyor or the tribunal of appeal should refuse to certify the accuracy of the same such person shall in altering or rebuilding the said building or structure be bound by the preceding provisions of this section in all respects as though no building or structure had previously existed upon the land within the period aforesaid Provided (e) always that no dwelling-house to be inhabited or adapted to be

(x) Notice of the appeal must be given to the local authority : *Regulations of the Tribunal of Appeal*, 1895, § 4.

(y) The Court will not grant a *mandamus* to compel the L. C. C. to consent to the retention of a wall : *R. v. L. C. C.*, 66 L. J. Q. B. 516.

(z) See s. 5 (5), *ante*.

(a) The local authority, and the owners and occupiers of the nearest building on each side of the proposed building, must be served with notice of the appeal : *Regulations of the Tribunal of Appeal*, 1895, § 4.

(b) The short effect of this proviso is to enable buildings in existence at the passing of the Act (or within seven years before that date) to be pulled down and re-erected without compliance with the rule laid down in s.s. 1. The new buildings need not necessarily be of the same class or character as the previous buildings : *L. C. C. v. Davis and Rowton House*, 77 L. T. 693. As to the rules to be observed in making such applications, see the current regulations, § 11. (2), *post*.

(c) Where a site previously occupied by a number of buildings had been cleared, and a different number of new buildings had been erected on the site, these buildings were held to be re-erected within the meaning of the sub-section, although the boundaries of each building differed from those of the former buildings : *L. C. C. v. Davis and Rowton House*, *supra*. In a later case, it was held allowable to erect a factory about 52 feet in height upon the site of six dwelling-houses : *L. C. C. v. Patman and Fotheringham*, 67 J. P. 235. See also *L. C. C. v. Davis and Rowton House*, *supra*.

(d) As to the requirements of plans, see *per* Lord Alverstone, C.J., in *L. C. C. v. Patman and Fotheringham*, *supra*.

(e) So far as it relates to dwelling-houses inhabited or adapted to be inhabited by persons of the working-class, and situate outside the city, this proviso is now, by virtue of the Amendment Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 4, to be read and to have effect as if the

inhabited by persons of the working class (*f*) shall without the consent of the Council be erected or re-erected within the *prescribed distance* to a height exceeding the distance of the front or nearest external wall of such building from the opposite side of such street and that no building or structure shall be converted into such dwelling-house within the *prescribed distance* so as to exceed such height:

Provided that this section shall not prevent the re-erection of any such dwelling-house erected previously to the passing of this Act by a local authority. (*g*)

(6) Nothing in this section shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes.

14. [*Repealed by the London Building Act, 1898, and replaced by s. 3 (3) of that Act. See *post*, p. 556.*]

15. *As to compensation in certain cases.*—In any case where—

(1) The Council under this Part of this Act make it a condition of their sanction

(a) the formation or laying out of any street for carriage traffic over land which either at the commencement of this Act or at any time within seven years previously has or shall have been occupied by buildings or by market garden; or

(b) the adaptation or use for carriage traffic of any street or way not previously so adapted or used

that the street or way shall be throughout or in any part of a greater width than forty feet; or

(2) The Council determine that the *prescribed distance* from the centre of the roadway shall be greater than twenty feet;

the Council shall be liable to pay to the owner of land or buildings required for such greater width or such greater *prescribed distance* compensation for the loss or injury (if any) sustained by him by such requirement.

The amount of such compensation if not agreed within two months from the time of such condition being made or determination arrived at may (unless the Council waive the condition or determination) be recovered in a summary manner (*h*) except where the amount of compensation claimed exceeds fifty pounds in which case the amount thereof shall be settled by arbitration according to the provisions contained in the Land Clauses Acts which are applicable where questions of disputed compensation are authorised or required to be settled by arbitration and for that purpose these Acts so far as applicable shall be deemed to be incorporated with this Act:

Provided always that within two months from the time of such condition or determination being made or arrived at if the amount of such compensation has not been settled before the expiration of such time it shall be lawful for the Council to waive such condition or determination.

Provided also that if the Council waive such condition or determination they shall pay to the owner the reasonable costs charges and expenses incurred by him in consequence of such condition or determination and in connection with the negotiations for the settlement of the amount of compensation:

words "a distance of twenty feet from the centre of the roadway" were substituted for the words "the *prescribed distance*," which are printed in italics. The "*prescribed distance*" is otherwise defined in s. 5 (3), *ante*.

(*f*) This expression is not defined in the Act, but it has been held to mean that class of persons who ordinarily live in such a condition of life that overcrowding is likely to take place: *L. C. C. v. Deane and Boston House*, 77 L. T. 693. See also *Crow v. Davis* (No. 1), 80 L. T. 467; and *Crow v. Davis* (No. 2), 68 J. P. 447. As to whether a stable in which horses belonging to a builder are kept, and in which they are fed and groomed, is a building "adapted to be used . . . as a place of habitual employment for any person in any manufacture trade or business," see *Lovell v. Foxgrove L. D. C.* (1904), 2 L. G. R. 372. See also s. 42, *post*.

(*g*) As to the re-erection of dwelling-houses generally, see s. 43, *post*, p. 496.

(*h*) That is, in a Court of Summary Jurisdiction. See s. 166, *post*, p. 534; and *St. Pancras Vestry v. Batterbury*, 26 L. J. C. P. 243; *R. v. Edwards*, 13 Q. B. D. 686; *R. v. Hannay*, 44 L. J. M. C. 27.

For the purpose of this section the expression "owner" has the same meaning as in the Land Clauses Acts. (i)

16. (k) *As to erection of buildings at less than prescribed distance from centre of ways not being highways.*—Where after the commencement of this Act—

(i) any new building or structure is erected or commenced in such manner that—

(a) any part of any external wall of any such building or structure; or if there be between such external wall and the roadway any forecourt or other space—

(b) any part of the external fence or boundary of such forecourt or space

is or will be in any direction distant from the centre of the roadway of any way (not being a highway) less than the prescribed distance or less than such other distance as may have been sanctioned by the Council or the tribunal of appeal; or

(ii) Any conditions or terms subject to which the sanction of the Council or the tribunal of appeal in relation to any such building structure forecourt or space was obtained have not been complied with; or

(iii) The time during which such sanction was limited to continue has expired; the way shall not become a highway except subject to the following provisions:—

(i) A written notice shall be served upon the Council of the proposal to make the way a public highway;

(ii) The Council may at any time within two months (l) after the receipt of such notice serve a notice upon the owner of such building structure forecourt or space or the builder requiring him to cause the same or any part thereof to be set back so that every part of any external wall of such building or structure or of the external fence or boundary of such forecourt or space shall be in every direction at a distance not less than the prescribed distance from the centre of the roadway of such way or at such distance and according to such conditions and terms (if any) as the Council or the tribunal of appeal may have sanctioned and prescribed;

(iii) Unless and until such first-mentioned notice has been given to the Council and such last-mentioned notice (if any) has been complied with the way shall not become a highway;

Provided that this section shall not affect the erection or extension of any building or structure within the limits of any area which may have been lawfully occupied by any building or structure at any time within two years before July 22, 1878, or the erection or extension of any building or structure lawfully in course of erection or extension on the said 22nd day of July.

17. (m) *Sanction to construction of new buildings at less than prescribed distance.*—The Council may sanction the erection of any new building or structure at any less distance than the prescribed distance from the centre of the roadway of any way (not being a highway) to be specified in such sanction or the continuance of any new building or new structure erected at such less distance or the continuance thereof for a limited time only to be specified in such sanction in such cases and subject to such terms and conditions (if any) as they may think proper

(i) The word "owner," as defined in the Lands Clauses Act, 1845 (8 Vict. c. 18), s. 3, means "any person or corporation who, under the provisions of this Act or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking."

(k) Re-enacting 41 & 42 Vict. c. 32, s. 7; 53 & 54 Vict. c. cxxliii. s. 34. As to "prescribed distance," see *ante*, p. 477; for penalties, *post*, s. 200.

(l) Where this period expires between August 8 and September 14 it is deemed to be extended for twenty-eight days. See s. 174, *post*.

"Months" mean calendar months (Interpretation Act, 1889, s. 3), excluding the day of the receipt of the application, but including the day of the refusal to sanction it. *Radcliffe v. Bartholemew* (1892), 1 Q. B. 161.

(m) Re-enacting 41 & 42 Vict. c. 32, s. 7.

And any such sanction may be framed in such manner as to apply to all new buildings in any such way or any part thereof.

Provided that the giving of such sanction by the Council shall not in any manner affect any rights of the owners of adjoining land.

18. (*n*) *Regulations to be printed and supplied.*—Copies of the printed regulations of the Council issued for the purposes of this Part of this Act shall be kept at the county hall and supplied at all reasonable times without charge to any applicants for the same.

19. *Appeal.*—Whenever any applicant under Part II. of this Act for the sanction of the Council to the formation or laying out of a street or the adaptation of a street or way for carriage or foot traffic or for the certificate of a district surveyor is dissatisfied with the refusal or conditional grant of such sanction or with any condition imposed by the Council or with the refusal of such certificate as aforesaid he may appeal to the tribunal of appeal.

20. *As to private roads laid out by a railway company.*—Nothing in this Part of this Act shall extend or apply to any private road formed or laid out by a railway company and used as an approach to a station or station yard or as an approach to land used for railway purposes.

21. *Exempting certain School Board buildings.*—Notwithstanding anything in this Act any buildings to be erected upon any lands now belonging to the School Board (o) for London (p) or over which they have powers of compulsory purchase or may acquire such powers in the present session of Parliament may be erected in accordance with the provisions of any Act in force immediately before the passing of this Act.

PART III.

LINE OF BUILDING FRONTAGE. (q)

22. (1) (*r*) *Made of proceeding with regard to buildings beyond line of street.*—No building or structure (s) shall without the consent in writing of the Council be

(a) See § II. (2) of the current regulations, *post*, p. 647, and see s. 216.

(o) See *L. C. C. v. London School Bd.* (1892), 2 Q. B. 606.

(p) This body is now replaced by the County Council, Education (London) Act, 1903.

(q) This part does not apply to the City (see s. 30, *post*), nor does it affect the powers conferred upon railways by their special Acts (see s. 81, *post*).

(r) The object of this subsection is to secure that the general line of buildings in a street shall be observed. There have been numerous decisions upon this section and s. 75 of the Metropolis Management Act, 1862, of which it is a re-enactment.

(s) *Definition of Building or Structure.*—The decision whether a given structure is or not a "structure or building" appears to be a question of fact. See *per* Kennedy, J., in *L. C. C. v. Illuminated Advertisement Co.* (1901), 68 J. P. 445, at p. 446. So a rule nisi for a mandamus to a magistrate to state a case under the section was refused on this ground, *Lord Service Corp. Society v. L. C. C., Builder*, July 11, 1903. "In Part III.," said Wills, J., in *Conner v. McDowell* (1897), 61 J. P. 181, at p. 183, "there seems to be very good reason for giving a wide meaning to the term structure." The following have been held to be buildings within the meaning of the section: A garden wall, *Finn v. Plumstead* (1893), 68 L. T. 29; a 14-inch wall 11 feet high, built in substitution for a dwarf wall with an iron railing, *Lacy & Lippin v. L. C. C.* (1890), 2 Q. B. 577; an iron glass shelter or portico, bracketed out from a building projecting about 4 feet over the public way (notwithstanding s. 75 of the Act), *Coburn Hotel v. L. C. C.* (1899), 63 J. P. 806. See also *Wenden v. L. C. C.* (1894), 1 Q. B. 227, 812, where the continuation of a 12-foot wall and making it into a building was held to be the erection of a new building. On the other hand, a station erected by a railway company under a special Act, was held not to be affected by s. 75 of the Metropolis Management Act, 1862, as the special Act was inconsistent with that Act, *City of S. London Ry. Co. v. L. C. C.* (1891), 2 Q. B. 513; and a number of advertisements consisting of metal cases

erected beyond the general line of buildings (*t*) in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highways. Such general line of buildings shall if required be defined (*u*) by the superintending architect by a certificate such certificate to be issued within one month from the date of the application therefor.

(2) This section shall not apply to any building or structure erected after this commencement of this Act upon land which either at the commencement of the Act or at any time within seven years previously has or shall have been lawfully occupied (*w*) by a building or structure.

23. (x) (1) Buildings projecting beyond general line when taken down to be set back.—In case any building or structure which shall in any part thereof project

with wood and canvas fronts arranged to be lit by electric light and fixed by iron supports to the front wall of a house, from which they projected 10 inches beyond the general line, were held not to be "structures," *L. C. C. v. Illuminated Advertisement Co.* (1904), 2 K. B. 886. See also note to s. 5 and cases there cited; and see *Clark v. St. Pancras Vestry*, 31 J. P. 181; *St. George's Vestry v. Sparrow*, 33 L. J. M. C. 118; *Kerr v. Preston (Corporation of)*, 6 Ch. D. 463, considered in *Grand Junction Waterworks v. Hampton U.C.* (No. 1) (1898), 2 Ch. 331; *Williams v. Wallasey L. Bd.*, 16 Q. B. D. 718; *L. C. C. v. Schewzik* (1905), 2 K. B. 695; and cases cited under s. 155 of the Public Health Act, 1875, *post*, p. 627. See also *Turner v. Partington Ad. Co.* 68 J. P. 318.

Proceedings for Penalties, etc.—Proceedings must be taken within six months of the commencement of the building beyond the line, and that although the architect's certificate was not issued until afterwards, *L. C. C. v. Cross*, 61 L. J. M. C. 160. See also s. 166, *post*, and notes thereto.

Proceedings are taken by the County Council under s. 200 (3), as amended by the Amendment Act, 1898, s. 7 (see p. 557, *post*). In addition to imposing a penalty, the Court may make an order to demolish the building or structure (see s. 170, *post*, p. 535). As to the powers of local authorities, see s. 171, *post*.

(*t*) *The General Line of Buildings.*—The general line of buildings may vary in different parts of the same street, and the building must conform to the line of the row of houses in which it is situated, *Barlow v. St. Mary Abbots, Kensington*, 11 A. C. 263. A corner house may be in two streets, and must conform to the line in both, *Gilbart v. Wandsworth Bd. of W.*, 60 L. T. 190. See also *Vixey v. L. C. C.* (1896), 60 J. P. 217. As to projections from shop fronts, bay windows, etc., see s. 73, *post*. As to demolition of buildings, see s. 170, *post*.

(*u*) *Defining the General Line.*—The superintending architect is to decide *pro re nata* what is the general line, *Bauman v. St. Pancras Vestry*, L. R. 2 Q. B. 528; and his decision is final, unless appealed against, in which case the decision of the Tribunal of Appeal is final, *Worley v. St. Mary Abbots, Kensington* (1892), 2 Ch. 404. In defining the general line he ought to have regard to any buildings previously existing on the site, although removed before the line was defined, *Lord Auckland v. Westminster D. Bd. of W.*, L. R. 7 Ch. 597. Before the offence of building beyond the line can be made the subject of proceedings, the line must be fixed, but the certificate of the architect may be issued either before or after the buildings have been erected, *Spackman v. Plumstead Bd. of W.*, L. R. 10 A. C. 229. See also *Simpson v. Smith*, 19 W. R. 355. It is for the architect to determine the extent of the space along which a line is to be laid down (*Barlow v. St. Mary Abbots, supra*), and in what street, place, or row of houses a building is situate, *Allen v. L. C. C.* (1895), 2 Q. B. 587. The Tribunal of Appeal can confirm, reverse, or vary his decision upon these points, *Re The London Building Act, 1894, and the L. C. C.* (1904), 91 L. T. 501; and see note to s. 181, *post*, p. 537.

(*w*) In *Scott v. Carritt* (1899), 82 L. T. 67, it was held that land occupied by buildings or structures originally erected thereon in accordance with s. 75 of the Metropolis Management (Amendment) Act, 1862, but subject to a condition that the height of such buildings or structures should not exceed one storey, is not lawfully occupied by such buildings or structures within the meaning of this section so as to justify the substitution without the consent of the County Council of three storeyed buildings or structures on the same sites in advance of the general line of buildings in the same part of the same street as fixed under the Act. See also *Wendon v. L. C. C.* (1894), 1 Q. B. 812, *ante*, p. 490.

(*x*) The section does not prevent the subsequent completion of a building existing in an unfinished state at the time when the general building line is established, but the work done must amount to a building or structure, *Wendon v. L. C. C.*, [1894] 1 Q. B. 812. As to time at which matter of complaint arises, see *L. C. C. v. Cross*, 61 L. J. M. C. 160. See § 11, (2) of the regulations of the County Council, *post*, p. 647.

beyond the general line of buildings in a street or beyond the front of the building wall or railing on either side thereof shall at any time be taken down (y) to an extent exceeding one-half of the cubical extent (z) of such building or structure or shall be destroyed by fire or other casualty or demolished pulled down or removed from any other cause to the extent aforesaid it shall be lawful for the Council to require the same building or structure or any new building or structure proposed to be erected on the site or any part of the site thereof to be set back to such a line and in such a manner as the Council shall direct. (a)

(2) The Council shall make compensation to the owner of such building for any damage and expenses which he may sustain and incur thereby and the amount of such compensation if not agreed between the Council and the parties concerned shall be recovered in a summary manner except where the amount of compensation claimed exceeds fifty pounds in which case the amount thereof shall be settled by arbitration according to the provisions contained in the Lands Clauses Acts which are applicable where questions of disputed compensation are authorised or required to be settled by arbitration and for that purpose these Acts so far as applicable shall be deemed to be incorporated with this Act.

For the purpose of this section the expression "owner" has the same meaning as in the Lands Clauses Act. (b)

24. (a) Notice of definition of general line.]—The superintending architect shall within fourteen days after the issue of the certificate defining the general line of buildings in any street or part of a street place or row of houses cause a notice of the certificate to be served on the local authority and on the owner of the building or land to which the certificate relates and on the owner of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which the certificate relates or where there is no such block or row upon the owner of the adjoining land on either side of the building or land to which the certificate relates. Certificates made by the superintending architect under this Part of this Act shall be preserved by the Council and be open to inspection at all reasonable times by all persons desiring to inspect the same.

25. Appeal against certificate of architect as to general line.]—The local authority or any person claiming himself aggrieved by the certificate of the superintending architect may appeal to the tribunal of appeal. (d)

26. (c) Conditions may be attached to consent to building in front of general line.]—In giving their consent for the erection of any building or structure beyond the general line of buildings in any street or part of a street place or row of houses the Council may attach any conditions to such consent (f) and such conditions may include any or all of the conditions following viz. :—

(1) That land in front of the building or structure to such an extent as the Council

(y) The owner of a house in a street block cut the front wall of the ground and first floors, and removed the first floor, with the view of turning the two lowest storeys into a shop. The house was held not to be "taken down" within the meaning of the Public Health Act, 1875, s. 135. *Att.-Gen. v. House*, 1895, 8 Ch. 31, and *post*, p. 628.

(z) Cubical extent is defined by s. 524, *supra*.

(d) As to manner of hearing and the effect of an appeal, see *Barlow v. St. Mary Abbeys*, 11 A. C. 207; *Gubert v. H. & A. Smith*, 10 L. T. 119. See now s. 29 of this Act, *post*, p. 492.

(e) Cf. s. 15 *ante*, and note thereto.

(f) Re-enacting ss. 23 & 24 Vict. c. cxxviii, s. 24.

(d) This re-enacts s. 28 of the London Council General Powers Act, 1882; see Part XV., *supra*, p. 244. As to what is "person aggrieved," see *Le Beck, Fox & Co. v. Q. B.*, 13 Q. B. D. 174, and cases under the Trade Mark Act, 1884, collected in *Selections of Trade Marks*. As to the Tribunal of Appeal, see ss. 175 *infra*, *post*. Notice of an appeal against the certificate must be given to the superintending architect, to the local authority, and to all other persons entitled under s. 24 *supra* to receive the superintending architect's certificate, *Regulations of the Tribunal of Appeal*, 1895, s. 4.

(e) Re-enacting ss. 25 & 26 Vict. c. 102, s. 76; 45 & 46 Vict. c. 14, s. 9. The County Council can only require dedication of the surface of the road.

(f) See also s. 19, *post*, p. 500.

may think proper shall be dedicated to and left open for the use of the public. (g)

- (2) That the building or structure shall be used only for such purposes as may be specified in the consent or shall not be used for any particular purposes specified in the consent unless with the further consent of the Council obtained when a change of purpose is desired :

And generally any other condition which the Council may deem it expedient to impose in the public interest.

27. *Consent not to affect rest of general line.*—The consent by the Council to the erection of any building or structure beyond the general line of buildings in any part of a street or the erection of such building or structure shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent.

28. *Register of conditional consents to be kept and open for inspection.*—The Council shall keep a register of all conditional consents given by them under this Part of this Act and shall keep the same open for inspection by all persons interested at all reasonable times.

29. *Defining in what street a building or structure is situate.*—The superintending architect shall if required by the Council the local authority or any person interested for the purposes of this Part of this Act determine in any case in what street or streets a building or structure is situate such determination to be evidenced by his certificate. Any person aggrieved by such certificate may appeal to the tribunal of appeal. (h)

30. *Part of Act not to apply in City.*—This part of this Act shall not apply within the City.

31. *Certain powers of railway companies not affected by this part of Act.*—Nothing in this Part of this Act shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes. (i)

PART IV.

NAMING AND NUMBERING OF STREETS.

[32. (k) Notice of new name of street to be given to County Council.]

[33. (k) Affixing names of streets by local authority.]

[34. (k) Altering names of streets.]

[35. (k) Notice of altering names of streets by County Council.]

[36. Numbering houses. (k)]

(g) See as to dedication, *L. C. C. v. Best*, 9 T. L. R. 499.

(h) This re-enacts s. 33 of the London Council (General Powers) Act, 1890. See cases cited in note (a) to s. 23, *ante*, p. 491, and Part XV., *post*, p. 534. Notice of an appeal under this section must be given to the superintending architect, to the local authority, and to all other persons entitled to notice of the superintending architect's certificate, *Regulations of the Tribunal of Appeal*, 1895, § 4. See *Allen v. L. C. C.* (1895), 2 Q. B. 587.

(i) An authority in a special act to build a railway station on a particular site was held to override the enactments relating to the general building line: *City & S. London Ry. Co. v. L. C. C.*, [1891] 2 Q. B. 513; *Uckfield R. D. C. v. Crouborough Dist. Water Co.* (1899), 2 Q. B., *per* Ridley, J., at p. 671.

(k) Re-enacting 25 & 26 Vict. c. 102, s. 87. See the Regulations of the Council, § II. (13), *post*, p. 649.

[37. (f) Power to Council to name and number streets in default of local authority complying with order.]

[38. Register to be kept of alterations in names of streets. (m)]

PART V. (n)

OPEN SPACES ABOUT BUILDINGS AND HEIGHT OF BUILDINGS.

39. *Meaning of "domestic building" in this part of Act.*—For the purposes of this Part of this Act the expression "domestic building" (o) shall not include any building used or constructed or adapted to be used wholly or principally as offices or counting-houses.

40. *Light and ventilation on habitable basements.*—In the case of domestic building erected after the commencement of this Act which shall have a habitable basement there shall for the purpose of giving light and air to such basement be provided in the rear of the building and exclusively belonging thereto an open space of an aggregate extent of not less than 100 sq. ft. free from any erection thereon above the level of the adjoining pavement which open space notwithstanding anything herein after contained need not necessarily adjoin the rear boundary of the premises. (p)

41. (1) *Space at rear of domestic buildings.*—With respect to domestic buildings erected after the commencement of this Act and abutting (q) upon a street formed or laid out (r) after the commencement of this Act the following provisions shall have effect (s):—

(i) There shall be provided in the rear of every such building an open space exclusively belonging to such building and of an aggregate extent of not less than 150 sq. ft.;

Where there is a basement storey directly and sufficiently lighted and ventilated by the open space provided under the preceding section irrespective of any use to which the ground storey is appropriated or where there is no such basement storey but where the ground storey is not constructed or adapted to be inhabited the open space required by this section may be provided above the level of the ceiling of the ground storey or a level of 16 ft. exclusive of lantern-lights measured from the level of the adjoining pavement;

In all other cases the open space shall be free from any erection thereon above the level of the adjoining pavement except a water-closet or earth-closet

(i) Re-enacting 45 & 46 Vict. c. 11, s. 5.

(m) Re-enacting 18 & 19 Vict. c. 120, s. 142.

(n) This part is, except ss. 47 to 49, new.

(o) Domestic buildings are defined in s. 5 (26). See also *L. C. v. Davis & Rowton House*, 77 L. T. 693. For the purposes of a byelaw requiring the provision of an open space at the rear of a new domestic building, the whole range of a line of buildings which was intended for use for the purposes of stabling and coach-houses must be regarded as a single building. [A plan of the building in the above case is printed in the report at p. 166.] *A.-G. v. Melrose* (1900), 4 L. G. R. 166.

(p) See Public Health (London) Act, 1891, ss. 96 *et seq.*, *post*, p. 612. For penalties, see s. 269 (3) (r).

(q) As to meaning of "abutting," see *Great Faversham Ry. v. Hackney Dist. Bd.*, 8 A. C. 687, at p. 696; *Williams v. Widdoworth Dist. Bd.*, 13 Q. B. D. 211. Where two or more properties, with entrances from more than one street, are occupied for one purpose, they are considered as one, and "abut" on all the streets; *The Oxford, Ltd. v. L. C. C.* (1904), 2 Ch. 491. See also *L. C. C. v. Chases* (1905), 3 L. G. R. 1103, and note to s. 77 of the Met. Man. Act, 1867, *post*, p. 537.

(r) As to when a person is deemed to commence a street, see s. 8, *ante*, p. 482.

(s) For penalties, see s. 269 (3) (r), *post*, p. 541.

or privy and a receptacle for ashes and enclosing walls none of which erections shall exceed 9 ft. in height :

- (ii) Such open space shall extend throughout the entire width of such building and to a depth in every part of at least 10 ft. from such building :
- (iii) The height of any such building in relation to the space required in the rear thereof shall be fixed and ascertained as follows :—
 - (a) An imaginary line (hereafter referred to as “ the horizontal line ”) shall be drawn at right angles to the roadway formed or to be formed in front of the building and through or directly over a point in front of the centre of the face of the building ;
 - (b) The horizontal line shall be produced to intersect the boundary of the open space furthest from the said roadway ;
 - (c) The horizontal line shall be drawn throughout at the level of the pavement formed or to be formed in front of the centre of the building unless the site of the building incline towards the roadway or site of the roadway in which case the horizontal line shall be drawn directly over the said point in front of the centre of the face of the building at the level throughout of the ground at the boundary of the space furthest from such roadway where such boundary is intersected by the horizontal line ;
 - (d) A second imaginary line (in this Part of this Act called “ the diagonal line ”) shall be drawn in the direction of the building above and in the same vertical plane with the horizontal line and inclined thereto at an angle of $63\frac{1}{2}$ degrees and meeting the horizontal line where it intersects the boundary of the space furthest removed from such roadway ;
 - (e) No part of such building shall extend above the diagonal line except chimneys dormers gables turrets or other architectural ornaments aggregating in all to not more than one-third of the width of the rear elevation of such building and except any building which under the provisions of this section is permitted on the open space ;
 - (f) When the pavement in front of a building is not all on one level then for the purpose of compliance with this section the mean level of such pavement shall be deemed to be the level thereof.
 And where the boundary of the space at the rear of such building is not parallel with the rear wall of the building then for the purpose of this section the horizontal line shall be drawn to a point distant from such rear wall the mean distance from such wall of the boundary of the space at the rear of such building whether such point be beyond the said boundary or not ;
 - (g) When the boundary of the space at the rear of any such building shall be so irregular in shape that a doubt arises as to how the measurement shall be taken application shall be made to the Council and the applicant if dissatisfied with the determination of the Council may appeal to the tribunal of appeal ; (t)
 - (h) When the land at the rear of any such building and exclusively belonging thereto abuts immediately upon a street or upon an open space which is dedicated to the public or the maintenance of which as an open space is secured permanently or to the satisfaction of the Council by covenant or otherwise the horizontal line shall be produced and the diagonal line may be drawn from the horizontal line at the centre of the roadway of such street at the level of the surface thereof or at the further boundary of such open space and it shall not be necessary to provide any open space at the rear of such building :
- (iv) The Council may—
 - (a) In the case of a building at a corner abutting (u) upon two streets ;
 - (b) In the case of a building at a corner abutting on one side upon a street and on another side upon an open space not less than 40 ft. wide at any part

(t) See Part XV., *post*, p. 534.

(u) See note to s. 41 (1), *ante*.

the maintenance of which as an open space is secured permanently or to the satisfaction of the Council by covenant or otherwise;

permit the erection of buildings not exceeding 30 ft. in height upon such part of the space in the rear as they may think fit provided that the Council be satisfied that such buildings shall be so placed as not to interfere unduly with the access of light and air to neighbouring buildings;

When the Council refuse any application under this subsection for permission to erect a building not exceeding 30 ft. in height upon the space at the rear the applicant if dissatisfied with the determination of the Council may appeal to the tribunal of appeal: (u)

(v) In the case of buildings at a corner as hereinbefore described nothing in this Part as to the determination of height by the diagonal line shall prevent the return front of such buildings being carried up to the full height of the front elevation for a distance of 40 ft. or for such less distance as the requirements for open space at the rear may demand;

(vi) In exceptional cases where owing to the irregular shape of the land any of the preceding provisions of this section cannot be applied the Council may after such modifications as they may think fit provided the Council be satisfied that such modifications shall not interfere with the due access of light and air and all persons interested dissatisfied with any determination of the Council under this subsection may appeal to the tribunal of appeal. (u)

(2) With respect to domestic buildings erected after the commencement of this Act all those upon a street formed or laid out before the commencement of this Act the provisions of this section shall apply with this modification that the horizontal line shall be drawn throughout at a level of 16 ft. above the level of the adjoining pavement and that in any such case (except in the case of dwelling-houses to be inhabited or adapted to be inhabited by persons of the working class) the open space to be provided in accordance with paragraphs (i) and (ii) and s. 1 of this section may be provided above the level of the ceiling of the ground storey or above a level of 16 ft. (exclusive of lantern-lights) above the level of the adjoining pavement.

Provided always that notwithstanding the preceding provisions of this Part of this Act any part of any domestic building may extend above the diagonal line provided that the Council or tribunal of appeal shall be satisfied that an open cubic space of air will be provided at the rear of such building equivalent to the open cubic space which would have been provided at the rear of such building if such diagonal line had been drawn from the ground level in manner provided in s. 1 (ii) of this section and if no part of such building (except as permitted under the preceding provisions of this section) had extended above such diagonal line. The applicant if dissatisfied with the determination of the Council may appeal to the tribunal of appeal. (u)

Nothing in this section shall apply to houses abutting in the rear on the River Thames or on a public park or on an open space of not less than 80 ft. in depth which is dedicated to the public or the maintenance of which as an open space is secured permanently or to the satisfaction of the Council by covenant or otherwise.

42. Open space to be provided about certain buildings not on the public way.—(1) The following provisions shall have effect with respect to dwelling-

houses:—(a) to be inhabited (b) or adapted to be inhabited by persons of the working class (c) erected after the commencement of this Act not abutting upon a street:—(d)

(u) See Part XV., *post*, p. 534.

(x) See Part XV., *post*, p. 534.

(z) For a limitation to the operation of the section, see s. 51, *post*. See *Metropolitan Bd. of Works v. Nash*, 54 L. T. 423.

(a) See s. 5 (25), *ante*.

(b) See s. 5 (37), *ante*.

(c) See notes to s. 13 (5), *ante*, p. 424.

(d) See s. 5 (1), *ante*.

- (i) At least one month before commencing to erect any such dwelling-house the person intending to erect the same shall deliver at the county hall a sufficient plan or plans exhibiting the extent and height of the intended dwelling-house in its several parts and also its position in relation to every other building either already existing or in course of erection which is adjacent thereto : (e)
- (ii) In any case where the Council are satisfied taking all the circumstances of the case into consideration that there will not be provided about such dwelling-house a sufficient open space or spaces for the admission of light and air thereto it shall be lawful for the Council at any time before the expiration of one month (f) from the delivery of the said plan or plans by order (g) to refuse to sanction such plan or plans or to sanction the same subject to such conditions as they may by such order prescribe.
 Provided always (h) that nothing in this sub-section shall authorise the Council to refuse to sanction such plan or plans or to prescribe any conditions when sanctioning the same in any case where the open space or spaces for the admission of light and air proposed to be provided about such dwelling-house is or are equivalent to the open space or spaces which would have been provided about such dwelling-house under the provisions of this Act in case the same had been erected after the commencement of this Act abutting upon a street or way formed or laid out before the commencement of this Act :
- (iii) No person shall commence to erect any such dwelling-house without having obtained the sanction of the Council to the plans delivered by him : (i)
- (iv) Unless the Council shall within one month (k) after the delivery of the said plan or plans to them give notice to the person delivering the same of their disapproval thereof the Council shall be deemed to have given their sanction thereto :
- (v) In case any person intending to erect any such dwelling-house considers that the refusal of the Council to sanction the plans delivered by him or any of the conditions prescribed by the Council is or are unreasonable he may appeal to the tribunal of appeal. (l)

43. *Saving for certain domestic buildings on old sites.*—When any person intends to erect a domestic building (not being a dwelling-house to be inhabited or adapted to be inhabited by persons of the working class) abutting upon a street on the site of domestic buildings existing at the commencement of this Act or on a site vacant at the commencement of this Act but which has been occupied by a domestic building at any time within seven years previous to the commencement of this Act the following provisions shall have effect :

- (i) It shall be lawful for such person before commencing to erect the intended domestic building to cause to be prepared plans showing the extent of the previously existing domestic building in its several parts (or in the event of such building having been taken down before the commencement of this Act or having been accidentally destroyed the best plans available under all the circumstances of the case) and to cause such plans to be submitted to the district surveyor who shall (if reasonably satisfied with the evidence of their accuracy) certify the same under his hand and such certificate shall be taken to be conclusive evidence of the correctness of the plans ; (m)

(e) See Byelaws and Regulations, § II. (3), *post*, p. 647. For penalties, see s. 200 (3) (b).

(f) Where this period expires between August 8 and September 14, it is deemed to be extended for 28 days, s. 174, *post*.

(g) Under seal : see s. 187 (2), *post*.

(h) See s. 41 (2), *ante*.

(i) For penalties, see s. 200 (3) (b).

(k) Where this period expires between August 8 and September 14, it is deemed to be extended for 28 days, s. 174, *post*.

(l) See Part XV., *post*, p. 534.

(m) As to the rules to be observed in relation to such plans, see § II. (4) of the Council Regulations, *post*, p. 647. See also *Paynter v. Watson* (1898), 2 Q. B. 31, *post*.

Such person may then erect the intended domestic building but so that no more land shall be occupied by the newly erected building than was occupied by the previously existing domestic buildings as so certified. If such person fail to submit such plans to the district surveyor or the district surveyor or the tribunal of appeal refuse to certify the accuracy of the same such person shall in rebuilding be bound by the preceding provisions of this Part of this Act relating to domestic buildings erected after the commencement of the Act abutting upon a street formed or laid out before that date:

- (f) If a person erecting the intended domestic building shall desire to deviate in any respect from the plan or plans certified by the district surveyor it shall be lawful for him to apply to the Council who shall sanction such deviations on such conditions as they may think fit provided that such conditions shall not in any case be more onerous than the conditions prescribed for domestic buildings erected after the commencement of this Act abutting on a street formed or laid out before that date: (g)
- (i) A person dissatisfied with any decision of the Council or of a district surveyor under this section may appeal to the tribunal of appeal: (o)

44. Laying out of new streets on cleared area. (p).—When any person desires to re-arrange a cleared area previously occupied in whole or in part by buildings by forming or laying out a new street or streets or widening a street or streets he may make application to the Council with such plans and sections (q) as may be required by the Council and the Council may if under all the circumstances of the case they think it desirable modify or relax any of the foregoing provisions of this Part of the Act subject to such conditions as the Council may impose.

Within two months (r) after the receipt of the application the Council shall either sanction the plans and sections or give notice to the applicant of their disapproval thereof stating fully all their reasons for such disapproval.

Provided that if within the said period of two months the Council fail to give notice of their disapproval of any such plan or section they shall be deemed to have given their sanction thereto.

Any applicant dissatisfied with the determination of the Council may appeal to the tribunal of appeal. (s)

45. Courts within a building.]—Where a court wholly or in part open at the top but enclosed on every side and constructed or used for admitting light or air to a domestic building is constructed in connection with such domestic building and the depth of such court from the eaves or top of the parapet to the ceiling of the ground storey exceeds the length or breadth of such court adequate provision for the ventilation of such court shall be made and maintained by the owner of the building by means of a communication between the lower end of the court and the outer air.

No habitable room not having a window directly opening into the external air otherwise than into a court enclosed on every side shall be constructed in any building unless the width of such court measured from such window to the opposite wall shall be equal to half the height measured from the sill of such window to the eaves or top of the parapet of the opposite wall.

(a) The plans to be certified must be a complete set of plans to show what the old building was in its various floors, and if the building owner wishes to alter the old building in area and outline when re-building, he must obtain the sanction of the Council: *Paynter v. Hudson* (1898), 2 Q. B. 31.

(b) See Part XV., *post*, p. 531. Notice of an appeal must be given to the District Surveyor; *Regulations of the Tribunal of Appeal*, 1895, § 4.

(p) This provision is new.

(q) As to such plans and sections, see the Council's Regulations, § II. (5).

(r) Where this period expires between August 8 and September 14, it is deemed to be extended for 24 days. See s. 174, *post*.

(s) See Part XV., *post*, p. 531. Notice of an appeal against the Council's determination in a case where a person desires to re-arrange a cleared area must be given to the local authority, *Regulations of the Tribunal of Appeal*, 1895, § 4.

Provided that a court of which the greater dimension does not exceed twice the less dimension shall be held to comply with this section if a court of the same area but square in shape would comply therewith.

No habitable room above the level of the ground storey not having a window directly opening into the external air otherwise than into a court open on one side the depth whereof measured from the open side exceeds twice the width shall be constructed in any building unless every window of such room be placed not nearer to the opposite wall of such court or to any other building than one half the height of the top of such wall or building above the level of the sill of such window. (s)

46. *Superintending architect may define front or rear of buildings.*—In any case when it may be necessary the superintending architect shall determine which is the front and which is the rear of a building such determination to be evidenced by his certificate. Any person dissatisfied with such certificate may appeal to the tribunal of appeal. (t)

47. (u) *Height of buildings limited.*—A building (not being a church or chapel) shall not be erected or be subsequently increased to a greater height (w) than 80 ft. (x) (exclusive of two storeys in the roof and of ornamental towers turrets or other architectural features or decorations) without the consent of the Council. (y)

Provided that where a contract shall have been lawfully made previously to the passing of this Act (z) for the erection or increase of a building to a greater height than 80 ft. nothing in this section shall prevent the erection or increase of such building to any height to which it might have been lawfully erected or increased immediately before the passing of this Act.

This section shall not apply to the rebuilding to the same height as at present of any building existing at the passing of this Act of a greater height than 80 ft.

Provided also that where any existing buildings forming part of a continuous block or row of buildings exceed the height prescribed by this section nothing in this section shall prevent any other building in the same block or row belonging at the date of the passing of this Act to the same owner from being carried to a height equal to but not exceeding that of the existing buildings.

Nothing in this section shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes.

48. (a) *Procedure where greater height allowed.*—(1) Whenever the Council consent to the erection of any building of a greater height than that prescribed by this Act notice of such consent shall within one week after such consent has been given be published and served in such manner as the Council may direct and the consent shall not be acted on until 21 days after such publication or service or in the event of any appeal against such consent until after the determination of such appeal.

(2) (a) The owner or lessee of any building or land within 100 yds. of the site of any intended building who may deem himself aggrieved by the grant of such consent in respect of the last-mentioned building; or

(b) Any applicant for consent which has been refused; may respectively within 21 days (b) after the publication of notice of the consent or after

(s) For penalty, see s. 200 (3) (b).

(t) See Part XV., *post*, p. 534. Notice of an appeal must be given to the superintending architect, *Regulations of the Tribunal of Appeal*, 1895, § 4.

(u) Re-enacting 25 & 26 Vict. c. 102, s. 83; 53 & 54 Vict. c. cexliii. s. 36 (1). For penalty, see s. 200 (3) (b).

(w) See s. 5 (21) for definition of height.

(x) Ninety feet was allowed under the Act of 1890.

(y) As to the delivery of plans and sections in order to obtain consent, see the Council's *Regulations*, § II. (6), *post*, p. 648.

(z) See *Tanner v. Oldham* (1896), 1 Q. B. 60, referred to in the note to s. 212, *post*.

(a) Re-enacting 53 & 54 Vict. c. cexliii. s. 36 (3).

(b) Where this period would expire between August 18 and September 14 in any year, it seems that it is automatically extended for 28 days, see s. 174, *post*.

the date of the refusal (as the case may be) appeal to the tribunal of appeal. (c)

(3) Whenever such consent has been refused and the applicant to whom it has been refused intends to appeal against such refusal such applicant shall give notice within 21 days of such refusal in such manner as the Council may direct to the owner or lessee of any building or land within 100 yds. of the site of the building to which such refusal relates that he intends to appeal from such refusal.

(4) In the case of an appeal against the refusal of consent any owner or lessee of any building or land within 100 yds. of the site of the intended building may appear and be heard before the tribunal of appeal against any application to reverse or vary the refusal. (c)

40. (d) *Heights of buildings in certain cases.*—After the commencement of this Act no existing building (other than a church or chapel) on the side of a street formed or laid out after August 7, 1862, and of a less width than 50 ft. shall without the consent of the Council be raised and no new building shall without the consent of the Council be erected on the side of any such street so that the height (c) of such building shall exceed the distance of the front or nearest external wall of such building from the opposite side of such street.

Where such building is erected or intended to be erected on a corner plot (f) so as to abut upon more than one street the height of the building shall (unless the Council otherwise consent) be regulated by the wider of such streets so far as it abuts or is adjacent upon such wider street and also so far as it abuts or will abut upon the narrower of such streets at a distance of 40 ft. from the wider street.

Provided that any building erected or raised before the commencement of this Act to a height to which no objection could have been taken under any law then in force (though exceeding the height provided in this section) may be re-erected to its existing height.

Nothing in this section shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes.

50. *Restriction of buildings as to comply with provisions of Act as to habitable rooms.*—Nothing in this Part of this Act contained shall prevent the raising of any building by increasing the height of the topmost storey thereof to such an extent (only as may be necessary for the purpose of bringing any habitable rooms constructed in such topmost storey into conformity with the provisions of this Act relating to habitable (g) rooms.

51. *As to re-erection of certain working-class dwellings of local authority.*—Nothing in this Part of this Act contained shall prevent the re-erection on the same site and of not greater dimensions of any dwelling-house inhabited or adapted to be inhabited by persons of the working class erected by a local authority previously to the passing of this Act.

52. *Saving for certain domestic buildings with stables in the rear.* (h)—In the case of domestic buildings (i) and buildings erected or adapted for use as stables such domestic buildings and such stable buildings being upon sites abutting in the front upon a street and in the rear upon mews and such sites being of a depth of not

(c) See Part XV., *post*, p. 441. Notices of appeal under s. 40 (2) (1) and (4) are to be served upon such owner or lessee as the Council may under this section direct, *Regulations of the Tribunal of Appeal*, 1894, § 4.

(d) Re-erection, 25 & 26 Vict. c. 112, s. 82. For penalty, see s. 200 (1) (b).

(e) As to the meaning of the expression "height," see s. 5 (21).

(f) As to corner plots under the old section, see *L. C. C. v. Lawrence*, [1893] 2 Q. B. 228; *Pease v. St. Mary Abbot*, 11 A. C. 277; *L. C. C. v. Wemyss*, [1904] 2 Q. B. 225. See also *The Oxford, Ltd. v. L. C. C.* (1899), 2 Ch. 491, cited in the notes to s. 41 (1), *ante*.

(g) The expression "habitable" means a room constructed or adapted to be inhabited, s. 5 (36).

(h) As to stables in railway arcades see *North Kent Railway Co. v. Bagger*, 27 L. J. M. C. 106, and see s. 81, *post*.

(i) See s. 5 (26).

more than 150 ft. measured from street to mews the following provisions shall in certain cases have effect :—

If the stable buildings be limited to a depth of 50 ft. measured from the mews frontage and to a height of 25 ft. measured from the level of the mews and if the open space required for the domestic building under s. 41 of this Act be provided between the domestic building and the stable building the domestic building and the stable building may for all other purposes of the said section whether in one occupation or not be deemed to be one domestic building with the rear abutting upon a street.

PART VI. (*k*)

CONSTRUCTION OF BUILDINGS.

53. (*l*) *Structure and thickness of walls.*—Subject to any byelaws of the Council made in pursuance of this Act (*m*) walls shall be constructed of the substances and in the manner and of not less than the thickness prescribed by this Act or mentioned in the first Schedule to this Act. (*n*)

54. (*o*) *Rules as to recesses and openings.*—(1) Recesses and openings may be made in external walls provided—

(a) That the backs of such recesses are not of less thickness than eight and a half inches ; and

(b) That the area of such recesses and openings above the ground storey do not taken together exceed one half of the whole area of the wall above the ground storey in which they are made.

(2) Recesses may be made in party walls provided—

(a) That the backs of such recesses are not of less thickness than thirteen inches ; and

(b) That over every recess so formed an arch of at least two rings of brickwork of the full depth of the recess be turned on every storey except in the case of recesses formed for lifts but where such recess does not exceed five inches in depth corbelling in brick or stone may be substituted for the arching ; and

(c) That the area of such recesses do not taken together exceed one half of the whole area of the wall of the storey in which they are made ; and

(d) That such recesses do not come within thirteen and a half inches of the inner face of the external walls.

(3) An opening shall not be made in any party wall except in accordance with the provisions of this Act in relation thereto.

Provided that it shall be lawful for the superintending architect on application made to him in accordance with any rules made in that behalf by the Council (*p*) to give consent in writing to any modification or relaxation of the requirements of this section with respect to the area of recesses and openings in any special cases where he may think proper. The word area as used in this section shall mean the area of the vertical face or elevation of the wall or recess to which it refers.

(*k*) As to penalties for offences against the provisions of this part, see s. 200 (3) (b). As to buildings, etc., which are exempt from the operation of this Part, see s. 201, *post*.

(*l*) Re-enacting 18 & 19 Vict. c. 122, s. 12. Under the old law the regulations did not apply to public buildings or buildings exempted from the old Act, *Reg. v. Carruthers*, 4 B. & S. 804.

(*m*) See s. 164 (1) (E) for power to make byelaws. Byelaws made under s. 16 of the Met. Man. Act, 1878, relating to thickness of walls, etc., are still in force.

(*n*) See *R. v. Redman*, 6 T. L. R. 9, as to delay in enforcing provisions of the old section (s. 12 of 1855 Act).

(*o*) Re-enacting 18 & 19 Vict. c. 122, s. 13.

(*p*) See the Regulations of the Council, § II. (7), *post*, p. 648.

55. (q) Rules as to timber in external walls.]—All woodwork fixed in any external wall except bressummers and storey posts under the same and frames of doors and windows of shops on the ground storey of any building shall be set back four inches at the least from the external face of such wall. But loophole frames and frames of doors and windows may be fixed flush with the face of any external wall:

Provided that it shall be lawful for the Council by by-law (r) or otherwise to exempt from the provisions of this section oak teak or other wood provided the work be constructed to the satisfaction of the district surveyor.

56. (s) Rules as to bressummers.]—(1) Every bressummer (t) whether of wood or metal shall have a bearing in the direction of its length of four inches at least at each end upon a sufficient pier of brick or stone or upon a timber or iron storey post fixed on a solid foundation in addition to its bearing upon any party wall or external wall and

the district surveyor shall have power in his discretion to require that every bressummer shall have such other storey posts iron columns stanchions or piers of brick or stone or corbels as may be sufficient to carry the superstructure and

the ends of such bressummer if of wood shall not be placed nearer to the centre line of the party walls than four inches.

(2) At each end of every metallic bressummer a space shall be left equal to one quarter of an inch for every 10 ft. and also for any fractional part of 10 ft. of the length of such bressummer to allow for expansion.

(3) A bond timber or wood plate shall not be built into any party wall and the ends of any wooden beam or joist bearing on such walls shall be at least four inches distant from the centre line of the party walls.

(4) Every bressummer bearing upon a party wall shall be borne by a templet or corbel of stone or iron tailed through at least half the thickness of the wall and of the full breadth of the bressummer.

(5) The end of any timber not permitted to be placed in or to have a bearing on a party wall may be carried on a corbel or templet of stone or iron or vitrified stoneware tailed into the wall to a distance of at least eight and a half inches or otherwise supported to the satisfaction of the district surveyor.

57. (u) Height and thickness of parapets to external walls.]—If any gutter any part of which is formed of combustible (w) materials adjoin an external wall such wall shall be carried up so as to form a parapet one foot at the least above the highest part of the gutter and the thickness of the parapet so carried up shall be at least eight and a half inches throughout.

58. Cases in which a wall to be deemed a party wall.]—In either of the following cases:—

(a) When a wall is after the commencement of this Act built as a party wall in any part; (x) or

(b) Where a wall built before or after the commencement of this Act becomes after the commencement of this Act a party wall in any part;

the wall shall be deemed a party wall for such part of its length as is so used.

59. (y) Height of party walls above roof.]—(1) Every party wall (z) shall be

(g) Re-enacting 18 & 19 Vict. c. 122.

(r) See the Regulations of the Council, § II. (8), *post*, p. 648.

(t) Re-enacting 18 & 19 Vict. c. 122.

(u) Defined, s. 5 (7), *ante*.

(w) Re-enacting 18 & 19 Vict. c. 122, s. 16.

(x) See Schedule I. of the Amendment Act, 1905, *post*, p. 571, for list of fire-resisting materials.

(y) See *Knight v. Purcell*, 11 Ch. D. 412, cited in the note to s. 5 (16), *ante*.

(z) Re-enacting 18 & 19 Vict. c. 122, s. 17.

(z) For an instance of a case in which the provisions of this section were relaxed, the party wall being really a dividing wall, see *Drury v. Army & Navy Stores* (1906), 2 Q. B. 271, referred to in the note to s. 75, *post*, p. 510. In *Weston v. Arnold*, L. R. 8 (7), App. 1984, it

carried up of a thickness in a building of the warehouse class (a) equal to the thickness of such wall in the topmost storey and in any other building of eight and a half inches above the roof flat or gutter of the highest building adjoining thereto to such a height as will give a distance (in a building of the warehouse class exceeding 30 ft. in height) of at least 3 ft. and (in any other building) of fifteen inches measured at right angles to the slope of the roof or fifteen inches above the highest part of any flat or gutter as the case may be.

(2) Every party wall shall be carried up of the thickness aforesaid above any turret dormer lantern-light or other erection of combustible (b) materials fixed upon the roof or flat of any building within 4 ft. from such party wall and shall extend at the least twelve inches higher and wider on each side than such erection and every party wall shall be carried up above any part of any roof opposite thereto and within 4 ft. therefrom. (c)

60. (d) *Rules as to chases in party walls.*—In a party wall a chase shall not be made wider than fourteen inches nor more than four and a half inches deep from the face of the wall nor so as to leave less than eight and a half inches in thickness at the back or opposite side thereof and a chase shall not be made within a distance of 7 ft. from any other chase on the same side of the wall or within thirteen inches from an external wall. No chase shall be made in a wall of less thickness than thirteen inches.

61. (e) *Rules as to construction of roofs.*—(1) The flat gutter and roof of every building and every turret dormer lantern-light skylight or other erection placed on the flat or roof thereof shall be externally covered with slates tiles metal or other incombustible materials (f) except wooden cornices and barge-boards to dormers not exceeding twelve inches in depth and the doors door frames windows and window frames of such dormers turrets lantern-lights skylights or other erections.

(2) [*This sub-section was repealed by the Amendment Act, 1905, s. 12 of that Act being substituted for them, see post, p. 564.*]

(3) The plane of the surface of the roof of a building of the warehouse class (g) shall not incline from the external or party walls upwards at a greater angle than 47° with the horizon. Provided that this sub-section shall not apply to towers turrets or spires.

(4) The plane of the surface of the roof of any other building shall not incline from the external or party walls upwards at a greater angle than 75° with the horizon. Provided that this sub-section shall not apply to towers turrets or spires.

62. *Storeys in roofs.*—(1) Not more than two storeys shall be constructed in the roof of any domestic building.¹

(2) Any storey constructed in the roof of any domestic building the upper surface of the floor of which storey is at a height of above 60 ft. from the street level shall be constructed of fire-resisting (h) materials throughout.

was held that a wall may be a party wall for part of its height and may be an external wall for the rest of its height.

(a) Defined, s. 5 (28), *ante*.

(b) See Amendment Act, 1905, Sched. I., *post*, p. 571.

(c) "When a man builds a party wall as the external wall of his own house, and it overlooks an adjoining lower house, I think the requirements of the law as to party walls cease at a limited distance above the adjoining owner's house. In my opinion s. 59 ought to be construed in that sense." *Dict. of Wright, J., in Drury v. Army & Navy Stores* (1896), 2 Q. B. 271, and *post*, p. 510.

(d) Re-enacting 18 & 19 Vict. c. 122, s. 18.

(e) *Ibid.*, s. 19.

(f) "Duroline"—a material consisting of woven iron wire, coated with an oleaginous compound, the coating whereof will ignite and burn away, leaving the wirework uninjured—is not "incombustible material." *Payne v. Wright*, [1892] 1 Q. B. 104. The material must be such as will not burn at all.

(g) See definition, s. 5 (28), *ante*.

(h) See Amendment Act, 1905, Sched. I., *post*, p. 571.

63. *Means of escape at top of high buildings.*—Every new building exceeding sixty feet in height shall be provided on the storeys the upper surface of the floor whereof is above sixty feet from the street level with such means of escape in the case of fire for the persons dwelling or employed therein as can be reasonably required under the circumstances of the case and no such storeys of such building shall be occupied until the Council shall have issued a certificate that the provisions of this section have been complied with in relation thereto. (i)

64. (j) *Rules as to chimneys and flues.*—(1) Chimneys built on corbel (k) of brick stone or other incombustible materials (l) may be erected if the work so corbelled out do not project from the wall more than the thickness of the wall measured immediately below the corbel but all other chimneys shall be built on solid foundations and with footings similar to the footings of the wall against which they are built unless they are carried upon iron girders with direct bearings upon a party external or cross wall to the satisfaction of the district surveyor.

(2) Chimneys and flues having proper root doors of not less than forty square inches may be constructed at any angle but in no other case shall any flue be erected at a less angle than 45° to the horizon and every angle shall be properly rounded.

All root doors shall be at least fifteen inches distant from any woodwork.

(3) An arch of brick or stone or a bar of wrought iron of sufficient strength shall be built over the opening of every chimney to support the breast thereof and if the breast project more than four inches from the face of the wall and the jamb on either side be less than seventeen and a half inches the abutments shall be strengthened by an iron bar or bars of sufficient strength turned up and down at the ends and built into the jambs for at least eight and a half inches on each side.

(4) A flue shall not be adapted to or used for any raw oven furnace cockle steam-boiler or close fire used for any purpose of trade or business or to or for the raising or cooking apparatus of any hotel tavern or eating-house unless the flue be surrounded with brickwork at least eight and a half inches thick from the floor on which such oven furnace cockle steam-boiler or close fire is situate to the level of the ceiling of the room next above the same.

(5) A flue shall not be used in connection with a steam-boiler or hot-air engine unless the flue is at least 20 ft. in height measured from the level of the floor on which such engine is placed.

(6) The inside of every flue (m) and also the outside where passing through any floor or roof or behind or against any woodwork shall be rendered pargeted (n) or lined with fire-resisting piping of stoneware.

(7) The position and course of every flue shall be distinguished on the outside of the work as it is carried up by outline marks in some durable manner except when the exterior face of the flue forms part of the outer face of an external wall not likely to be built against.

(8) The jamb (o) of every fireplace opening shall be at least eight and a half inches wide on each side of the opening thereof.

(9) The breast of every chimney and the brickwork surrounding every smoke flue shall be at least four inches in thickness.

(10) The back of every fireplace opening in a party wall from the hearth up to the height of twelve inches above the mantel shall be at least eight and a half inches thick.

(11) The thickness of the upper side of every flue when its course makes with the horizon an angle of less than 45° shall be at least eight and a half inches.

(i) This section was repealed by the Amendment Act, 1905, s. 7 of that Act being substituted for it, see p. 561, *post*. It is apprehended that this provision will not prevent the use of wood for doors and window frames.

(j) Re-enacting 18 & 19 Vict. c. 122, s. 20.

(k) "Corbel," i.e. a short piece of timber, iron, etc., jutting out in the manner of a shoulder-piece.

(l) See Amendment Act, 1904, Sched. 1, *post*, p. 571.

(m) See *Jennings v. Dixon*, *Times*, June 28, 1872, as to "pargeting a flue." Woolrych's Metropolitan Acts.

(n) "Pargeted," e.g. rough plastered.

(o) "Jambs," i.e. side pieces.

(12) Every chimney shaft or smoke flue shall be carried up in brick or stone work at least four inches thick throughout to a height of not less than 3 ft. above the roof flat or gutter adjoining thereto measured at the highest point in the line of junction with such roof flat or gutter. (p)

(13) The highest six courses of every chimney-stack or shaft shall be built in cement.

(14) The brickwork or stonework of any chimney shaft except that of the furnace of any steam engine brewery distillery or manufactory shall not be built higher above the roof flat or gutter adjoining thereto than a height equal to six times the least width of such chimney shaft at the level of such highest point in the line of junction unless such chimney shaft is built with and bonded to another chimney shaft not in the same line with the first or otherwise rendered secure.

(15) There shall be laid level with the floor of every storey before the opening of every chimney a slab of stone slate or other incombustible substance at the least six inches longer on each side than the width of such opening and at the least eighteen inches wide in front of the breast thereof.

(16) On every floor except the lowest floor such slab shall be laid wholly upon stone or iron bearers or upon brick trimmers (q) or other incombustible materials but on the lowest floor it may be bedded on concrete covering the site or on solid materials placed on such concrete.

(17) The hearth or slab of every chimney shall be bedded wholly on brick stone or other incombustible substance and shall together with such substance be solid for a thickness of six inches at least beneath the upper surface of such hearth or slab.

(18) A flue shall not be built in or against any party structure unless it be surrounded with new brickwork at least four inches in thickness properly bonded. (r)

(19) A chimney breast or shaft built with or in any party wall shall not be cut away unless the district surveyor certifies that it can be done without injuriously affecting the stability of any building.

(20) A chimney shaft jamb breast or flue shall not be cut into except for the purpose of repair or during some one or more of the following things:—

(a) Letting in or removing or altering flues pipes or funnels for the conveyance of smoke hot air or steam or letting in removing or altering smoke jacks;

(b) Forming openings for soot doors such openings to be fitted with a close iron door and frame;

(c) Making openings for the insertion of ventilating valves subject to the following restriction that an opening shall not be made nearer than twelve inches to any timber or combustible substance.

(21) Timber or woodwork shall not be placed—

(a) In any wall or chimney breast nearer than twelve inches to the inside of any flue or chimney opening;

(b) Under any chimney opening within ten inches from the upper surface of the hearth of such chimney opening;

(c) Within two inches from the face of the brickwork or stonework about any chimney or flue where the substance of such brickwork or stonework is less than eight inches thick unless the face of such brickwork or stonework is rendered.

(22) Wooden plugs shall not be driven nearer than six inches to the inside of

(p) See *Perkins v. Munro & Taylor* (1905), *Builder*, February 25, 1905, p. 216, where Mr. Fordham held that this sub-section requires every chimney or flue to be of brickwork, in spite of the fact that s. 66 (3), *post*, apparently permits the use of pipes for conveying smoke.

(q) Small horizontal beams into which the ends of joists are framed.

(r) In *Aerated Bread Co. v. Shepherd* (1897), 13 T. L. R. 311, which was an action for trespass, the defendant put chimney flues against the plaintiff's party wall. These flues were constructed of actual new brick on three sides only, the two ends being bonded into the party wall and the face of that wall forming the fourth side of the flue. The surveyor passed the work. North, J., held that s. 64 (18) had not been complied with, saying that the expression "new brickwork" meant new at the time of making the flue.

any flue or chimney opening nor any iron holdfast or other iron fastening nearer than two inches thereto.

65. (s) Furnace chimney shafts.]—Unless the Council otherwise permit (t) every chimney shaft for the furnace of a steam engine brewery distillery or manufactory shall be constructed in conformity with the following rules:—

- (1) Every shaft shall be carried up throughout in brickwork and mortar of the best quality and if detached shall taper gradually from the base to the top of the shaft at the rate of at least two inches and a half in 10 ft. of height:
- (2) The thickness of brickwork at the top of the shaft and for 20 ft. below the top shall be at least eight and a half inches and shall be increased at least one half brick for every additional 20 ft. measured downwards:
- (3) Every cap cornice pedestal plinth string-course (u) or other variation from plain brickwork shall be provided as additional to the thickness of brickwork required under this Act and every cap shall be constructed and secured to the satisfaction of the district surveyor:
- (4) The foundation (w) of the shaft shall always be made to the satisfaction of the district surveyor on concrete or other sufficient foundation:
- (5) The footings shall spread all round the base by regular offsets to a projection equal to the thickness of the enclosing brickwork at the base of the shaft and the space enclosed by the footings shall be filled in solid as the work progresses:
- (6) The width of the base of the shaft if square shall be at least one tenth of the proposed height of the shaft or if the same is round or of any other shape then one twelfth of the height:
- (7) Any fire bricks built inside the lower portion of the shaft shall be provided as additional to and independent of the thickness of brickwork prescribed by these rules and shall not be bonded therewith.

66. (x) Rules as to close fires and pipes for conveying vapour, etc.]—(1) The floor under every oven copper steam-boiler or stove which is not heated by gas and the floor around the same shall for a space of eighteen inches be formed of materials of an incombustible (y) and non-conducting nature not less than six inches thick.

(2) A pipe for conveying smoke or other products of combustion heated air steam or hot water shall not be fixed against any building on the face adjoining to any street or public way.

(3) A pipe for conveying smoke or other products of combustion shall not be fixed nearer than nine inches to any combustible materials. (z)

(4) A pipe for conveying heated air or steam shall not be fixed nearer than six inches to any combustible materials.

(5) A pipe for conveying hot water shall not be placed nearer than three inches to any combustible materials.

Provided that the restrictions imposed by this section with respect to the distance at which pipes for conveying hot water or steam may be placed from any combustible materials shall not apply in the case of pipes for conveying hot water or steam at low pressure.

For the purposes of this section hot water or steam shall be deemed to be at low pressure when provided with a free blow off.

(1) See too Public Health (London) Act, 1891, ss. 23, 24, as to consumption of smoke.

(t) See the Regulations of the Council, § 11. (s), *post*.

(u) "String-course," i.e. a projecting horizontal band or line of mouldings in a building.

(w) See s. 5 (9), *ante*.

(z) Re-enacting 18 & 19 Vict. c. 122, s. 21.

(y) This does not appear to be synonymous with the expression "fire-resisting materials," which term has a very definite meaning under this Act. See Sched. I. to the Act of 1905, *post*.

(z) See note to s. 64 (12), *ante*.

67. *Floors above furnaces and ovens.*—The floor over any room or enclosed space in which a furnace is fixed and any floor within eighteen inches from the crown of an oven shall be constructed of fire-resisting materials.

68. (a) *Rules as to accesses and stairs in certain buildings.*—In every public building and in every other building of more than 125,000 ft. in cubical extent and which is constructed or adapted to be used as a dwelling-house for separate families the floors of the lobbies corridors passages and landings and also the flights of stairs shall be of fire-resisting material (b) and carried by supports of a fire-resisting material. (b)

69. *Ventilation of staircases.*—(1) In every building constructed or adapted to be occupied in separate tenements by more than two families the principal staircase used by the several families in common shall be ventilated upon every storey above the ground storey by means of windows or skylights opening directly into the external air or shall be otherwise adequately ventilated.

(2) The principal staircase in every building being a dwelling-house and not subject to the provisions of sub-section 1 of this section shall be ventilated by means of a window or skylight opening directly into the external air.

70. (c) *Rules as to habitable rooms.*—(1) (a) Every habitable room except rooms wholly or partly in the roof shall be in every part at least 8 ft. 6 ins. in height from the floor to the ceiling ;

(b) Every habitable room wholly or partly in the roof of any building shall be at least 8 ft. in height from the floor to the ceiling throughout not less than one-half the area of such room ;

(c) Every habitable room shall have one or more windows opening directly into the external air or into a conservatory with a total superficies clear of the sash frames free from any obstruction to the light equal to at least one-tenth of the floor area of the room and so constructed that a portion equal to at least one-twentieth of such floor area can be opened and the opening in each case shall extend to at least seven feet above the floor level but a room having no external wall or a room constructed wholly or partially in the roof may be lighted through the roof by a dormer window with a total superficies clear of the sash frames free from any obstruction to the light equal to at least one-twelfth of the floor area of the room and so constructed that a portion of such window equal to at least one twenty-fourth of such floor area can be opened and the opening in each case shall extend to at least five feet above the floor level or such room may be lighted by a lantern-light of which a portion equal to at least one-twentieth of the floor area can be opened ; (d)

(d) In a building being a dwelling-house every basement (e) room having a wooden floor other than a floor constructed of solid wood bedded on concrete shall have a sufficient space between the ground and the floor surfaces to admit of ventilation by means of air-bricks or otherwise ;

(e) Every habitable room constructed over a stable shall be separated from the stable by a floor which shall have in every part not occupied by a joist or girder a layer of concrete pugging of good quality or of other solid construction three inches in thickness finished smooth upon the upper surface and properly supported and the under side of such floor shall be ceiled with lath and plaster of good quality or of other solid construction ;

Any staircase or gallery or structure by which such rooms shall be approached shall be separated from any stable to which it may adjoin by a brick wall not less than nine inches in thickness ;

(f) Nothing in this Act shall affect alter or repeal any of the provisions of the Public Health (London) Act 1891 relating to underground rooms. (f)

(a) Re-enacting 18 & 19 Vict. c. 122, s. 22.

(b) For definition, see London Building Act, 1905, Sched. III., *post*.

(c) Re-enacting 18 & 19 Vict. c. 122, s. 23.

(d) For provisions relating to waterclosets, see the byelaws made by the County Council under the Public Health (London) Act, 1891, s. 39 (1).

(e) See definition, s. 5 (12).

(f) An underground room includes any room of a house the surface of the floor of which is

(2) If any person knowingly suffer any room constructed after the commencement of this Act that is not constructed in conformity with this section to be inhabited he shall in addition to any other liabilities to which he may be subject be liable to a penalty for every day during which such room is inhabited.

71. (g) Rules as to party arches over public ways.]—(1) Every party arch or party floor and every arch or floor over any public way or any passage leading through or under a building or part of a building to premises in other occupation shall be formed of brick stone or other combustible materials.

(2) If an arch of brick or stone be used it shall be of the thickness of eight and a half inches at least, and the centre of such arch shall be higher than the springing at the rate of one inch at least for every foot and also for any fractional part of a foot of span.

(3) If an arch or floor of other combustible material be used it shall be constructed in such manner as may be approved by the district surveyor.

72. (h) Rules as to arches under public ways.]—(1) Every arch or other construction under any passage leading to premises in other occupation or under any public way or intended public way shall be formed of brick stone or other incombustible materials. (i)

(2) If an arch of brick or stone be used it shall—

(a) Where its span does not exceed 10 ft. be of the thickness of eight and a half inches at least;

(b) Where its span exceeds 10 but does not exceed 15 ft. be of the thickness of thirteen inches at least; and

(c) Where its span exceeds 15 ft. be of such thickness as may be approved by the district surveyor.

(3) If an arch or other construction of other incombustible material be used it shall be constructed in such manner as may be approved by the district surveyor. (k)

73. (l) Rules as to projections.]—The following provisions shall (except with the consent of the Council) (m) apply to projections from buildings:—

(1) Every cornice cornice string-course fascia window-dressing portico porch balcony verandah balustrade outside landing outside stairs and outside steps and architectural projection or decoration whatsoever and also the eaves barge-boards (n) and cornices to any overhanging roof except the cornice and dressings to the window fronts of shops and except the eaves barge-board and cornice to detached and semi-detached dwelling-houses and to other dwelling-houses in which the party walls are crenelled out so as to project four inches beyond such eaves barge-boards or cornices shall be of brick tile stone artificial stone slate cement or other fireproof (o) material:

more than 3 feet below the surface of the footway of the adjoining street or of the ground adjoining or near to the room. Public Health (London) Act, 1891, s. 96 (9). See further, as to dangerous rooms, ss. 96-98 of that Act.

(g) Re-enacting 18 & 19 Vict. c. 122, s. 24. "Street boxes" laid down by an electric lighting company or a local authority supplying electricity in accordance with the terms of a provisional order are "buildings, structures, or works" within the meaning of this Act, and must comply with the provisions of this section. *Whitechapel Board of Works v. Croze* (1901), 65 J. L. 519; *Charing Cross, etc., Electricity Co. v. Whithope* (1903), 88 L. T. 772.

(h) Re-enacting 18 & 19 Vict. c. 122, s. 25.

(i) *I.e.* not merely fire-resisting, but incombustible. As to the ownership of the soil of a street *see* *Macquarrie v. Macquarrie*, 1 Ch. 118.

(k) As to vaults under streets, see *Metropolis Management Act, 1859*, s. 101; and *City of London Sewers Act, 1844*, s. 125.

(l) Re-enacting 18 & 19 Vict. c. 122, s. 26. For the time within which proceedings are to be taken, see note (f) to s. 168, *post*.

(m) In order to obtain consent, plans must be submitted to the Council. See *Regulations of the Council*, § 11. (10), *post*.

(n) A "barge-board" is an inclined projecting board placed at the gable of a building hiding the horizontal timbers of the roof: *Webster*.

(o) This term is not defined in the Act. It probably has the same meaning as "fire-resisting," defined in *Sched. 1. of the Amendment Act, 1903*, p. 671, *post*.

For the purpose of this sub-section a pair of semi-detached houses shall be deemed to be one building :

- (2) (p) Every balcony cornice or other projection shall be tailed into the wall of the building and weighted or tied down to the satisfaction of the district surveyor and no cornice shall exceed in projection 2 ft. 6 ins. over the public way :
- (3) In a street or way of a width not greater than 30 ft. any shop front may project beyond the external wall of the building to which it belongs to any extent not exceeding five inches and
 - any cornice of any such shop front may project to any extent not exceeding thirteen inches and
 - in any street or way of a width greater than thirty feet any shop may project to any extent not exceeding ten inches and
 - any cornice of any such shop front may project to any extent not exceeding eighteen inches beyond the external wall of the building to which it belongs over the ground of the owner of the building
 provided that this provision shall not authorise in any such street the projection of any part of any such shop front other than the cornice on or over the public way or any land to be given up to the public way : (q)
- (4) No part of the woodwork of any shop front shall be fixed higher than 25 ft. above the level of the pavement of the public footpath in front of the shop. No part of the woodwork of any shop front shall be fixed nearer than four inches to the centre of the party wall where the adjoining premises are separated by a party wall or nearer than four inches to the face of the wall of the adjoining premises where the adjoining premises have a separate wall unless a pier or corbel of stone brick or other incombustible material four inches wide at the least be placed as high as such woodwork and projecting throughout an inch at the least in front thereof between such woodwork and the centre of the party wall or the separate wall as the case may be :
- (5) In a street of a width not less than 40 ft. or to a building the front wall of which is not at a less distance than 40 ft. from the opposite boundary of the street
 - bay windows to dwelling-houses may be erected on land belonging to the owner of the building notwithstanding the provisions of this Act relating to buildings beyond the general line of buildings in streets
 - provided that such bay windows—
 - (a) Do not exceed three storeys in height above the level of the footway ;
 - (b) Do not project more than 3 ft. from the main wall of the building to which they are attached ;
 - (c) Do not project in any part within the prescribed distance of the centre of the roadway ;
 - (d) Are in no part nearer to the centre of the nearest party wall than the

(p) This sub-section refers only to projections from buildings in the nature of architectural projections or decorations, and to the overhanging parts of buildings, and it relates to the materials for the construction of the parts of the buildings to which it refers ; *per cur.* in *Hull v. L. C. C.* (1901), 1 Q. B. 580, at p. 586.

(q) This sub-section relates only to projections in the nature of architectural decorations, *ib.* It authorises the projection of cornices beyond the general building line, whatever the position of the building line may be, and not only where the building line being set back from the street, the projections are capable of being made on private land, *Fortescue v. Vestry of St. Matthew, Bethnal Green*, [1891] 2 Q. B. 170, overruling *St. Mary, Islington v. Goodman*, 23 Q. B. D. 154. No right of action or to an injunction can be asserted by a private person in respect of projections contravening this section, *Brooks v. Terry*, 4 T. L. R. 678 ; and see *per Farwell, J.*, in *Mullis v. Hubbard* (1903), 2 Ch. 431, at p. 437 ; 72 L. J. Ch. 593 ; 88 L. T. 661 ; 67 J. P. 281 ; 51 W. R. 571 ; 1 L. G. R. 769. The remedy is by intervention of the Attorney-General or by mandamus to the Council or district surveyor, see *R. v. Redman*, 6 T. L. R. 9. In *Coburg Hotel Co. v. L. C. C.* (1899), 63 J. P. 805, the erection of a porch beyond the general building line was held to contravene s. 22 of the Act : *q.v.* p. 489, *ante*, and notes thereto.

extreme amount of their projection from the main wall of the building to which they are attached;

- (e) Do not taken together exceed in width three fifths of the frontage of the building towards the street to which such bays face;
- (f) Are not constructed upon any part of the public way or upon any land agreed to be given up to the public way; and
- (g) Shall not be used for trade purposes;

Bay windows to which the foregoing rules do not apply shall not be erected without the consent of the Council (r) after consulting the local authority:

- (6) In a street of a width not less than 40 ft. or to a building the front wall of which is not at a less distance than 40 ft. from the opposite boundary of the street projecting oriel windows or turrets may be constructed provided that—
 - (a) No part of any such projection extend more than 3 ft. from the face of the front wall of the building or more than twelve inches over the public way;
 - (b) No part of any such projection be less than 10 ft. above the level of the footway of the street;
 - (c) No part of any such projection (where it overhangs the public way) be within a distance of 4 ft. of the centre of the nearest party wall;
 - (d) On no floor shall the total width of any such projections taken together exceed three fifths of the length of the wall of the building on the level of that floor;
 - (e) Every such projection be constructed to the satisfaction of the district surveyor or in the event of disagreement to the satisfaction of the superintending architect whose determination shall be final:
 - oriel windows or turrets to which the foregoing rules do not apply shall not be erected without the consent of the Council (r) after consulting the local authority:
- (7) The roof flat or gutter of every building and every balcony verandah shop front or other similar projection or projecting window shall be so arranged and constructed and so supplied with gutters and pipes as to prevent the water therefrom from dropping upon or running over any public way:
- (8) Except in so far as is permitted by this section in the case of shop fronts and projecting windows and
 - with the exception of water pipes and their appurtenances copings string-courses cornices facias window dressings and other like architectural decorations
 - no projection (s) from any building shall extend beyond the general line of buildings in any street except with the permission of the Council (r) (after consulting the local authority).

74. (f) *Separation of buildings.*—(1) Every building shall be separated either

(r) In order to obtain this consent, plans must be submitted. Regulations of the Council, § 11. (1), *post*.

(s) In *Hill v. L. C. C.* (1901), 1 Q. B. 580, it was held that a wooden case with a glass front for advertising purposes fixed to the front of a building on iron brackets did not come within this sub-section, inasmuch as the whole of s. 73 applies only to projections forming part of the building from which they project. This decision was disapproved in *L. C. C. v. Illuminated Advertisements Co.* (1901), 2 K. B. 886, cited in the notes to s. 22 (1), *ante*. Note, however, that there is power to deal with any projection from a building in s. 119 of the Met. Man. Act, 1855, *post*, p. 583; and that the County Council have power, under s. 164 (1) of the present Act (see p. 442), to make byelaws as to the erection of structures over the public way. See also *L. C. C. v. Schenck* (1896), 2 K. B. 693, cited in the notes to s. 22 (1), *ante*. In *Scott v. Womersley, Builder*, October 24, 1896, p. 213, a police magistrate refused to interfere where the appellant had allowed a shop front to project 10 inches and the pilasters 14 inches beyond the external wall of his premises.

(t) Re-enacting 18 & 19 Vict. c. 112, s. 27.

by an external wall (*w*) or by a party wall (*x*) or other proper party structure from the adjoining building (if any) and from each of the adjoining buildings (*y*) (if more than one).

(2) In every building exceeding 10 squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house (*z*) the part used for the purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials and all passages staircases and other means of approach to the part used as a dwelling-house shall be constructed throughout of fire-resisting materials. (*a*)

The part used for purposes of trade or manufacture shall (if extending to more than 250,000 cubic feet) be subject to the provisions of this Act relating to the cubical extent of buildings of the warehouse class: (*b*)

Provided that there may be constructed in the walls of such staircases and passages such doorways as are necessary for communicating between the different parts of the building and there may be formed in any walls of such building openings fitted with fire-resisting doors.

(3) In every building exceeding 25 squares in area containing separate sets of chambers or offices or rooms tenanted or constructed or adapted to be tenanted by different persons the floors and different staircases shall be of fire-resisting materials:

But this provision shall not entitle the district surveyor to charge for the inspection of each set of chambers as a separate building. (*c*)

75. (*d*) *Cubical extent of buildings.*—Except as in this section provided no building of the warehouse class shall extend to more than 250,000 cubic feet (*e*) unless divided by party walls (*f*) in such manner that no division thereof extend to more than 250,000 cubic feet.

No addition shall be made to any building of the warehouse class or to any division thereof so that the cubical extent of any such building or division shall exceed 250,000 cubic feet. (*g*)

The restriction contained in this section upon the cubical extent of a building shall not apply to any building which being at a greater distance than two miles from Saint Paul's Cathedral is used wholly for the manufacture of the machinery and boilers of steam vessels or for a retort-house or the manufacture of gas or for generating electricity

(*v*) See definition, s. 5 (15), *ante*.

(*x*) *Ib.*, s. 5 (16), *ante*.

(*y*) As to the meaning of adjoining buildings, see *Iford Estate Co. v. Jacobs* (1903), 2 Ch. 522. See also note to s. 5 (32), *ante*, p. 480.

(*z*) A public-house is not a building used in part for the purposes of trade and in part as a dwelling-house, and it is therefore not necessary that the means of approach to the living rooms shall be of fire-resisting materials, *Carritt v. Godson* (1899), 2 Q. B. 193. Where, however, a magistrate found as facts that "the basement and ground floor of the building are intended to be used for the purpose of the trade of a beerhouse, and the part above the ground floor is intended to be used as a dwelling-house for the licensed occupier," the Court of Appeal held that this was a finding that the two parts of the building were separated, and that a conviction should be confirmed, *Dicksee v. Hoskins* (1901), 2 K. B. 650. It should be pointed out, however, that each member of the Court expressed the view that the magistrate's finding of fact was erroneous; and that Vaughan Williams, L.J., said (at p. 663 in the L. R.) that on this account their decision was useless as a guide to the construction of the section.

(*a*) Thus, a partition in a public-house separating the bar from a passage was directed to be made of brick, *Tanner v. Drew & Cadman, Builder*, February 12, 1898, p. 164.

(*b*) See definition, s. 5 (28), *ante*.

(*c*) This was so held, under the old Acts, in *Moir v. Williams*, [1892] 1 Q. B. 264. See Sched. III., Part I., *post*.

(*d*) Re-enacting 18 & 19 Vict. c. 122, s. 27 (4); 53 & 54 Vict. c. cxxliii., 329.

(*e*) "Cubical extent" is defined in s. 5 (24), *ante*.

(*f*) As to the use of the phrase "party wall" in this section, see *Drury v. Army Stores Co., Ltd.* (1896), 2 Q. B. 271. It has been held by a police magistrate that a concrete floor cannot be regarded as a "party wall" within the meaning of this section: *Croue v. Kearley & Tonge, Builder*, December 12, 1896, p. 501.

(*g*) This disposes of the difficulty raised in *Scott v. Legg*, 10 Q. B. D. 236, and *Holland v. Wallen*, 70 L. T. 376.

provided that such building consist of one floor only and be constructed of brick, stone, iron or other incombustible material throughout and shall not be used for any purpose other than such as hereinbefore specified.

Every such building shall for the purpose of the provisions of this Act with respect to special buildings be deemed to be a building to which the general rules of this Act are inapplicable.

76. (h) Consent to larger dimensions.]—Where the Council are satisfied on the report of the superintending architect and of the chief officer of the fire brigade that additional cubical extent is necessary for any building to be used for any trade or manufacture and are satisfied that proper arrangements have been or will be made and maintained for lessening so far as reasonably practicable danger from fire the Council may consent to such building containing additional cubical extent:

Provided that such building shall not—

(1) Extend to a number of cubic feet exceeding 450,000 or any less number allowed by the Council without being divided by party walls in such manner that the cubical extent of each division do not exceed that number;

(2) Exceed 60 ft. in height;

(3) Be used for the purpose of any trade or manufacture involving the use of explosive or inflammable materials.

Such consent shall continue in force only while the said building is actually used for the purpose of the trade or manufacture in respect of which the consent was granted.

77. (k) Rules as to uniting buildings.]—(1) Buildings shall not be united except where they are wholly in one occupation or are constructed or adapted to be so. (l)

(2) Buildings shall not be united if when so united and considered as one building only they would not be in conformity with this Act. (m)

(3) An opening shall not be made in any party wall or in two external walls dividing buildings which if taken together would extend to more than 250,000 cubic feet except under the following conditions:—(o)

(a) Such opening shall not exceed in width seven feet or in height eight feet and such opening or openings taken together shall not exceed one half the length of such party wall on each floor of the building in which they occur;

(A) Re-enacting 53 & 54 Vict. c. cxxliii., s. 29; 23 & 24 Vict. c. 52, s. 2.

(i) In order to obtain this consent, plans must be submitted. See Regulations of the Council, § II. (11).

(A) Re-enacting 18 & 19 Vict. c. 122, s. 28.

(1) The words "constructed or adapted to be so" mean either buildings originally constructed to be in one occupation or buildings which, not originally so constructed, have been subsequently adapted to be in one occupation. They have reference to the state of things at the time of the uniting and not at the time of the original construction, *Woodthorpe v. Spencer* (1899, 63 J. P. 246). The principle of this decision is in accord with that in *St. Matthew (Vestry) v. London School Board* (1898), A. C. 190, where it was held that a pipe originally constructed as a drain for one house is converted into a sewer by the builder or owner of another house wrongfully and illegally connecting the drainage of a second house with that of the first.

This sub-section applies only to the union of buildings which in the first instance were completely erected as separate structures, and does not apply to the union of several buildings in the course of erection for the purpose of transforming them and finishing them as a separate structure, *Goodhead v. Matthews* (1900), 67 J. P. 296.

(m) The alteration of an old building by an addition was not within this rule under the old Act, unless the addition was at some time a separate building in itself. *Scott v. Legg*, 19 Q. B. D. 236; but see now s. 75.

(n) The old measurement was 216,000 cubic feet, s. 28 of Building Act, 1855.

(o) Where two houses have been united by means of an opening in the party wall before this Act came into operation, and an opening is made into another building so as to connect the same with the two houses, if the three houses together contain more than 250,000 cubic feet, the two houses will be considered as one building, and the requirements of the Act must be observed. *Ashby v. Woodthorpe*, 33 L. J. M. C. 68.

- (b) Such opening shall have the floor jambs and head formed of brick stone or iron and be closed by two wrought iron doors each one fourth of an inch thick in the panel at a distance from each other of the full thickness of the wall fitted to rebated frames without woodwork of any kind or by wrought iron sliding doors or shutters properly constructed fitted into grooved or rebated into frames;
- (c) If the thickness of the wall be not less than twenty-four inches or the doors be placed at a distance from each other of not less than twenty-four inches such opening may be 9 ft. 6 ins. in height.
- (4) Whenever any buildings which have been united cease to be in one occupation all openings made for the purpose of uniting the same in any party wall between the buildings or in any external wall shall be stopped up with brick or stone work not less than thirteen inches in thickness (except in the case of a wall eight and a half inches in thickness in which case eight and a half inches shall be sufficient) and properly bonded with such wall and any timber not in conformity with this Act placed in the wall shall be removed.
- (5) Whenever any buildings which have been united cease to be in one occupation the owner thereof shall forthwith give notice to the district surveyor and shall cause any openings made in the party wall to be stopped up and bonded as aforesaid. (*p*)

[78. (*q*) Construction of public buildings.]

79. (*r*) *Conversion of houses, etc., into public buildings.*—Where it is proposed to convert or alter any building erected for a purpose other than a public purpose into a public building such conversion or alteration shall be carried into effect and the public building thereby formed including the walls roofs floors galleries and staircases thereof shall be constructed in such manner as may be approved by the district surveyor or in the event of disagreement may be determined by the tribunal of appeal and the provisions of this Act shall apply to such alteration or conversion as though it were the construction of a public building.

[80. Staircases in churches and chapels.]

[81. Application of Act to buildings under railway arches. (*s*)]

PART VII. (*t*)

SPECIAL AND TEMPORARY BUILDINGS AND WOODEN STRUCTURES.

82. (*u*) *Application to Council for buildings to which rules of Act are inapplicable.*—(1) Where a builder is desirous of erecting an iron building or structure or any other building or structure to which the general provisions of Part VI. of this Act are inapplicable or in the opinion of the Council inappropriate having regard to the special purpose for which the building or structure is designed and actually used he shall make an application to the Council accompanied by a plan of the proposed building with such particulars as to the construction thereof as may be required by the Council.

(*p*) For penalty, see s. 200, *post*, p. 540.

(*q*) Re-enacting 18 & 19 Vict. c. 122, s. 30.

(*r*) *Ib.*, s. 15; and see s. 211, *post*, p. 545.

(*s*) As to stables in an arch, see *North Kent Ry. Co. v. Badger*, 27 L. J. M. C. 106.

(*t*) As to buildings, etc., which are exempt from the operation of this part, see s. 201, *post*. Applications with regard to temporary buildings and structures must be accompanied by plans. See also s. 200 (3), as amended by s. 6 of the London Building Act, 1898. See Regulations of the Council, § 11. (12).

(*u*) Re-enacting 18 & 19 Vict. c. 122, ss. 56, 57, 58, 60, 61. This section and s. 83 have no application to such an operation as that of replacing the seating in the Agricultural Hall: see *per Wills, J.*, in *Venner v. McDonnell* (1897), 61 J. P. 181, at p. 183. See also *per Alverstone, C.J.*, in *Westminster Corporation v. L. C. C.* (1902), 1 K. B. 326, at p. 334.

72.] The Council if satisfied with such plan and particulars shall signify their approval of the same in writing and thereupon the building may be constructed according to such plan and particulars but the Council shall not authorise any building of the warehouse class to be erected of greater cubical extent than 250,000 cub. ft. except in accordance with the foregoing provisions of this Act.

(3) The Council may for the purpose of regulating the procedure in relation to such applications make such general rules as they think fit as to the time and manner of making applications and as to the plans to be presented the expenses to be incurred and any other matter or thing connected therewith. (w)

(4) All expenses incurred in and about the obtaining the approval of the Council shall be paid by the builder to the superintending architect or to such other person as the Council may appoint and in default of payment may be recovered in a summary manner.

(5) A copy of any plans and particulars approved by the Council shall be furnished to the district surveyor within whose district the building to which such plans and particulars relate is situate and it shall be his duty (x) to ascertain that the same is built in accordance with the said plans and particulars.

83. (y) *Control by Council of certain temporary buildings.*—Where an application is made to the Council by any person stating his desire to erect in any place an iron or other building or structure of a temporary character to which the general provisions of Part VI. of this Act are inapplicable the Council may if they approve of the plan and particulars of the building or structure limit the period during which it shall be allowed to remain in that place and may make their approval subject to such conditions as to the removal of the building or structure or otherwise as they think fit and if at the expiration of that period the building or structure be not removed in accordance with those conditions the Council may serve a notice on the occupier or owner of such building or structure requiring him to remove it within a reasonable time specified in the notice and if the occupier or owner fail to remove such building or structure within the time named the Council may notwithstanding the imposition and recovery of any penalty cause complaint thereof to be made before a petty sessional court who shall thereupon issue a summons requiring such occupier or owner to appear to answer such complaint and if the said complaint is proved to the satisfaction of the Court the Court may make an order in writing authorising the Council to enter upon the land upon which such building is situated and to remove or take down the same and do whatever may be necessary for such purpose and also to remove the materials of which the same is composed to a convenient place and (unless the expenses of the Council be paid to them within 14 days after such removal) sell the same as they think proper.

84. *Wooden structures not to be erected without licence of Council.*—(1) No person shall set up in any place any wooden structure (z) (unless it be exempt

(w) See § 11. r. (12) of the current regulations, *post*, p. 649.

(x) Enforceable by mandamus, *R. v. Redman*, 6 T. L. R. 9.

(y) Re-enacting 45 & 46 Vict. c. 11, s. 12. See *Parsons v. Timewell*, 41 J. P. 296, as to terms on which the Council might authorise the buildings in question under the old Acts. See note to s. 83, *supra*.

(z) The words in the old section (s. 13 of the Act of 1882) were "any wooden structure or erection of a moveable or temporary character"; on this it was held that a builder's office, constructed of wood and roofed with zinc, and placed upon iron wheels, for the purpose of enabling it to be wheeled about to any place where building operations were being carried on, and when not so required kept in the builder's own yard and used as a pay office, was not "a wooden structure of a moveable or temporary character." It is part of the builder's plant, *L. C. C. v. Pearce*, [1892] 2 Q. B. 180. (See, now, s.s. (2), *infra*.) Nor is a steam roundabout, shooting gallery, and caravan, *Hall v. Swallowpiece*, 59 L. J. M. C. 97. Nor a bungalow erected for sale on the maker's premises, *L. C. C. v. Humphreys*, [1894] 2 Q. B. 755. Where a structure was erected without licence, but no complaint of such erection was made for six months after completion, the offence was held to be continuous as long as the structure existed, *Metcalf v. W. v. Anthony*, 51 L. J. M. C. 39. Wooden stables are, it would seem, now included; see *Hobbs v. Dwyer*, L. R. 9 C. P. 39; and a stand made entirely of wood,

from the operation of this Part of this Act) (a) except hoardings (b) enclosing vacant land and not exceeding in any part 12 ft. in height without having first obtained for that purpose a licence (c) from the Council (d) and the licence may contain such conditions with respect to the structure and the time for which it is to be permitted to continue in the said place as the Council think expedient.

(2) Provided that a licence shall not be required in the case of any wooden structure of a movable or temporary character erected by a builder for his use during the construction alteration or repair of any building unless the same is not taken down or removed immediately after such construction alteration or repair.

Provided that this section shall not extend to or apply within the City or to any hoarding duly licensed by the local authority under any statutory powers in that behalf. (e)

85. *Piles of loose timber not regarded as structures.*—This Part of this Act shall not apply in the case of a pile stack or store of timber not being a structure affixed or fastened to the ground. (f)

86. *As to structures of railway companies.*—Structures or erections erected or set up upon the premises of any railway company and used for the purposes of or in connection with the traffic of such railway company shall be exempt from the operation of this Part of the Act. (g)

PART VIII. (h)

RIGHTS OF BUILDING AND ADJOINING OWNERS.

87. *Rights of owners of adjoining lands respecting erection of walls on line of junction.*—Where lands of different owners adjoin and are unbuilt on at the line of

except for the nails and fastenings, erected to enable persons to view a public procession, was held to be a "wooden structure" within the section, *Westminster Corporation v. L. C. C.* (1902), 1 K. B. 326. See further as to this case, note (d), *infra*. The Act only applies to structures erected for use on the spot, *L. C. C. v. Humphreys, supra*; a structure erected by a builder in which to carry on business of licensed premises during alterations and repairs is exempt, *L. C. C. v. Candler*, 60 L. J. M. C. 114. It has been held in an unreported case (*Odwell v. Willesden L. Bd.*, *Times*, December 2, 1891) that a coffee stall on wheels is within the corresponding provisions of the Public Health Act, 1875. For penalties, see s. 200, *post*, p. 540.

(a) See s.s. (2), *infra*.

(b) Hoardings were held not to be buildings within s. 157 of the Public Health Act, 1875, in *Slaughter v. Mayor of Sunderland*, 60 L. J. M. C. 91.

(c) It is an offence to set up, erect, retain, or adapt any such building or structure without having obtained any approval or licence as required by this part of the Act, or to make default in observing any of the conditions contained in such licence: s. 200 (3) (e), as amended by the Amendment Act, 1898, s. 6 (see p. 557, *post*). The amendment, by which the words in italics were introduced, was rendered necessary by the case of *R. v. Cluer, Ex parte L. C. C.* (1897), 67 L. J. Q. B. 36.

(d) The power to license temporary wooden structures (such as stands to be erected on the occasion of public functions) and to take proceedings for default in obtaining or observing the conditions of a licence is transferred from the London County Council to each of the London borough councils created by the London Government Act, 1899 (62 & 63 Vict. c. 14), by s. 5 (1) and Sched. II., Pt. I. of that Act: *Westminster Corporation v. L. C. C.* (1902), 1 K. B. 326. As to the duties of district surveyors in relation to such structures, see *Westminster (City Council) v. Watson* (1902), 2 K. B. 717, and cited in the note to s. 145, *post*.

(e) As to the city, see City Sewers Act, 1848, s. 162: *Bradbee v. Christ's Hospital*, 4 M. & G. 714. As to local authorities, see Metropolitan Paving Act, 1817, s. 75 (57 Geo. III. c. cxxix.); Metropolitan Management Act, 1855, ss. 122, 123.

(f) As to storing of wood and timber, see s. 197, *post*.

(g) An office erected by a coal merchant with the permission of a railway company and used to expedite the delivery of coal, and for the receipt of orders for coal conveyed on the railway, is "used for the purposes of and in connection with the traffic of the railway company" within the meaning of this section: *Elliott v. L. C. C.* (1899), 2 Q. B. 277. See also s. 201 (8), *post*, which exempts certain buildings of a railway company from the operation of Parts VI. and VII. of the Act.

(h) See *ante*, Chap. XXIV., as to the law generally with respect to party walls, and

junction and either owner is about to build on any part of the line of junction the following provisions shall have effect:—

- (1) If the building owner desire to build a party wall on the line of junction he may serve notice (i) thereof on the adjoining owner describing the intended wall:
- (2) If the adjoining owner consent to the building of a party wall the wall shall be built half on the land of each of the two owners or in such other position as may be agreed between the two owners:
- (3) The expense of the building of the party wall shall be from time to time defrayed by the two owners in due proportion regard being had to the use made and which may be made of the wall by the two owners respectively:
- (4) If the adjoining owner do not consent to the building of a party wall the building owner shall not build the wall otherwise than as an external wall placed wholly on his own land:
- (5) If the building owner do not desire to build a party wall on the line of junction but desires to build an external wall placed wholly on his own land he may serve notice thereof on the adjoining owner describing the intended wall:
- (6) Where in either of the cases aforesaid the building owner proceeds to build an external wall on his own land he shall have a right at his own expense at any time after the expiration of one month from the service of the notice to place on the land of the adjoining owner below the level of the lowest floor the projecting footings (j) of the external wall with concrete or other solid substructure thereunder making compensation to the adjoining owner or occupier for any damage occasioned thereby the amount of such compensation if any difference arise to be determined in the manner in which differences between building owners and adjoining owners are hereinafter directed to be determined: (k)

Where an external wall is built against another external wall or against a party wall it shall be lawful for the district surveyor to allow the footing of the side next such other external or party wall to be omitted.

88. (l) Rights of building owner.—The building owner shall have the following rights (m) in relation to party structures (that is to say):—

- (1) A right to make good underpin or repair any party structure which is defective or out of repair:
- (2) A right to pull down and rebuild any party structure which is so far defective or out of repair as to make it necessary or desirable to pull it down: (n)

Chap. XXV. as to the right to support. See *Watson v. Gray*, 14 Ch. D. 192. This Part of the Act does not exonerate a builder from liability for damage which has arisen from his negligence and want of care and skill; e.g. in underpinning a party wall in a neighbouring house, *White v. Peck*, 58 L. T. 710. See *Seawell v. Webster*, 29 L. J. Ch. 71, as to an owner of adjoining houses entering upon the premises of his tenant to repair a party wall. See *Wheeler v. Gray*, 4 C. B. N. S. 584; 6 *eb.* 606.

(i) As to the requirements of a notice, see notes to s. 90 (1). See F. XXXIX., *et seq.*, ante, p. 491.

(j) Where each adjoining owner has an external wall, the Act does not give the right to place footings on the adjoining land, *Thornton v. Hunter, Builder*, February 4, 1898. This sub-section to a certain extent overrides the common law, which prevents encroachment on the land of an adjoining owner.

(k) See s. 91 (1), and s. 95.

(l) Re-enacting 18 & 19 Vict. c. 122, s. 83.

(m) This means the following rights and no other; it is the definition of the rights he is to have, *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 68. But, if the provisions of the statute are not followed, the building owner is liable to an action for all injury done, *Prest v. Holmes*, 4 H. & C. 250.

It was held, under 14 Geo. III. c. 74, that a general covenant to repair did not render the tenant liable to pay the expense of a party wall, *More v. Clark*, 5 Taunt. 80; but see *Barent v. Duke of Bedford*, 8 T. R. 692, which shows that he would be liable under an express covenant. In *Knight v. Purcell*, 11 Ch. D. 412, the rights of the building owner under the corresponding section of the Metropolitan Building Act, 1855, were held to apply equally to a party wall belonging entirely to the adjoining owner.

(n) But see s. 90 (1), *post*, as to party structure notices.

- (3) A right to pull down any timber or other partition which divides any buildings and is not conformable with the regulations of this Act and to build instead a party wall conformable thereto :
- (4) In the case of buildings having rooms or storeys the property of different owners intermixed a right to pull down such of the said rooms or storeys or any part thereof as are not built in conformity with this Act and to rebuild the same in conformity with this Act :
- (5) In the case of buildings connected by arches or communications over public ways or over passages belonging to other persons a right to pull down such of the said buildings arches or communications or such parts thereof as are not built in conformity with this Act and to rebuild the same in conformity with this Act :
- (6) A right to raise and underpin any party structure permitted by this Act to be raised or underpinned or any external wall built against such party structure upon condition of making good all damage occasioned thereby to the adjoining premises (o) or to the internal finishings and decorations thereof and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against such party structure or external wall :
- (7) A right to pull down any party structure which is of insufficient strength for any building intended to be built and to rebuild the same of sufficient strength for the above purpose upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof: (p)
- (8) A right to cut into any party structure upon condition of making good all damage occasioned to the adjoining premises by such operation: (q)
- (9) A right to cut away any footing or any chimney breasts jambs or flues projecting or other projections from any party wall or external walls in order to erect an external wall against such party wall or for any other purpose upon condition of making good all damage occasioned to the adjoining premises by such operation: (r)
- (10) A right to cut away or take down such parts of any wall or building of an adjoining owner as may be necessary in consequence of such wall or building overhanging the ground of the building owner in order to erect an upright wall against the same on condition of making good any damage sustained by the wall or building by reason of such cutting away or taking down :
- (11) A right to perform any other necessary works incident to the connection of a party structure with the premises adjoining thereto. But the above rights shall be subject to this qualification that any building which has been erected previously to the date of the commencement of this Act shall be deemed to be conformable with the provisions of this Act if it be conformable with the provisions of the Acts of Parliament regulating buildings in London before the commencement of this Act :
- (12) A right to raise a party fence wall (s) or to pull the same down and rebuild it as a party wall.

89. (t) *Rights of adjoining owner.*—(1) Where a building owner proposes to

(o) This does not authorise the raising of a structure so as to obstruct ancient lights in the adjoining premises, *Crofts v. Haldane*, L. R. 2 Q. B. 194. The common law right to bring an action is not affected by the Act, *Williams v. Golding*, L. R. 1 C. P. 77. See chapter on Light, *ante*, p. 286, and see following cases on 14 Geo. III. c. 78, s. 43: *Wells v. Ody*, 1 M. & W. 452; *Titterton v. Conyers*, 1 Marsh. 140.

(p) See *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 68, *supra*; *R. v. Ponsford*, 1 D. & L. 116; *Foot v. Hodgson*, 25 Q. B. D. 160.

(q) See *Williams v. Golding*, *supra*. As to duty of person to use reasonable care and skill in operations which involve the use of a party wall, see *Hughes v. Percival*, 8 A. C. 443.

(r) See s. 64 (19).

(s) See definition, s. 5 (18).

(t) Re-enacting 18 & 19 Vict. c. 122, s. 84.

exercise any of the foregoing rights with respect to party structure the adjoining owner may by notice require the building owner to build on any such party structure such chimney, coping, gable, or breast, or flues, or such pier, or recess, or any other like works as may fairly be required for the convenience of such adjoining owner and may be specified in the notice and it shall be the duty of the building owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building owner or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right.

(2) Any difference that arises between a building owner and adjoining owner in respect of the execution of any such works shall be determined in manner in which differences between building owners and adjoining owners are hereinafter directed to be determined. (a)

90. (c) *Rules as to exercise of rights by building and adjoining owners.*—

(1) A building owner shall not except with the consent in writing of the adjoining owner (ac) and of the adjoining occupiers or in cases where any wall or party structure (x) is dangerous (in which cases the provision of Part IX. of this Act shall apply) exercise any of his rights under this Act in respect of any party fence wall unless at least one month or exercise any of his rights under this Act in relation to any party wall or party structure other than a party fence wall unless at least two months before doing so he has served on the adjoining owner a party wall or party structure notice (y) stating the nature and particulars of the proposed work and the time at which the work is proposed to be commenced.

(2) When a building owner in the exercise of any of his rights under this Part of the Act lays open any part of the adjoining land or building he shall at his own expense make and maintain for a proper time a proper hoarding and shoring or temporary construction for protection of the adjoining land or building and the security of the adjoining occupier. (z)

(3) A building owner shall not exercise any right by this Act given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or to the adjoining occupier. (a)

(4) A party wall or structure notice shall not be available for the exercise of any

(a) See s. 91, *post*.

(c) Re-enacting 18 & 19 Vict. c. 122, s. 85.

(x) See *Luttrell v. Thorne* (1897), 1 Ch. 250; and *Orf v. Payton*, 60 J. P. 103.

(y) See definition, s. 5 (20).

(y) This section and the 88th do not apply (so it was held under the old Act), and no notice is necessary, where the mere removal of a building from an adjoining building will not disturb the party structure, *Mason v. Park Lane Co.*, 2 Eq. 453. Aliter, it would seem, where the support of the building to be removed forms part of the party structure which separates the two buildings, although such party structure would not be utilised in the erection of new buildings by the person removing the building, *ib.* See *Scott v. Legg*, 10 Q. B. D. 236; *Frederickson v. Wood* (1891), 1 Ch. 51.

If a notice is given under this section that the defendants intend to pull down and rebuild a wall of the plaintiffs which is described as a party wall, although it is an external wall, and a request has been made for the withdrawal of such notice, an application could be made to the Court to restrain the defendants from proceeding on the notice, though they said they did not intend to act upon it. *Sum v. Eastgate Co.*, 11 W. R. 419. For forms of party notices, see F. XXXIX., *et seq.*, *ante*, p. 460.

The notice should be so clear and intelligible that the adjoining owner may be able to see whether he ought to give a counter notice, and what the nature of any such notice should be, *Harris v. Greener* (1899), 1 Ch. 11. See also *Leadbetter v. Marylebone Corp.* (No. 1) (1901), 2 K. B. 803.

(a) This alters the old law as laid down in *Thompson v. Hall*, L. R. 5 C. P. 461. And see *R. v. Pinner*, 1 D. & L. 116; *Hyder v. Wood*, 22 L. T. 493, as to enforcing provisions by action and not by mandamus.

(a) The building owner is liable for damages for delay in rebuilding a party wall, *Jolyffe v. Woodhouse*, 70 L. T. 376. And he cannot get rid of his liability by delegating the performance of the duty to a contractor or a third person, *Lemaitre v. Davis*, L. R. 19 Ch. 201; *Hughes v. Ferriss*, 8 A. C. 413. The builder himself may, however, be liable in certain cases, see *Harris v. Peto*, 58 L. T. 710. If a party wall be ever loaded, damages may be awarded against a building owner, *Hart v. March Land Co.*, *Building News*, March 11, 1892.

right unless the work to which the notice relates is begun within six months after the service thereof and is prosecuted with due diligence.

(5) Within one month after receipt of such notice the adjoining owner may serve on the building owner a notice requiring him to build on any such party structure any works to the construction of which he is hereinbefore declared to be entitled.

(6) The last-mentioned notice shall specify the works required by the adjoining owner for his convenience and shall if necessary be accompanied by explanatory plans and drawings.

(7) If either owner do not within fourteen days after the service on him of any notice express his consent thereto he shall be considered as having dissented therefrom and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner.

91. (c) Settlement of difference between building and adjoining owners.]—

(1) In all cases not specially provided for by this Act where a difference arises between a building owner and adjoining owner in respect of any matter arising (d) with reference to any work to which any notice given under this Part of this Act relates unless both parties concur in the appointment of one surveyor they shall each appoint a surveyor and the two surveyors so appointed shall select a third surveyor (e) and such one surveyor or three surveyors or any two of them shall settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner with power by his or their award to determine the right to do and the time and manner of doing any work and generally any other matter arising out of or incidental to such difference but any time so appointed for doing any work shall not unless otherwise agreed commence until after the expiration of the period by this Part of this Act prescribed for the notice in the particular case.

(2) Any award given by such one surveyor or by such three surveyors or by any two of them shall be conclusive and shall not be questioned in any court with this exception that either of the parties to the difference may appeal therefrom to the county court within fourteen days from the date of the delivery of the award and the county court may subject as hereafter in this section mentioned rescind the award or modify it in such manner as it thinks just.

(3) If either party to the difference make default in appointing a surveyor for ten days after notice has been served on him by the other party to make such appointment the party giving the notice may make the appointment in the place of the party so making default.

(4) The costs incurred in making or obtaining the award shall be paid by such party as the surveyor or surveyors determine.

(c) Re-enacting 18 & 19 Vict. c. 122, s. 85; 45 & 46 Viet. c. 14, s. 21. This section is limited expressly and in terms to matters referred to in the notice. It does not give the surveyors general jurisdiction over every dispute which may arise between the parties, but only over disputes "in respect of any matter arising with reference to any work to which any notice given under this part of this Act relates." *Per Collins, M.R., in Leadbetter v. Marylebone Corp.* (1904), 2 K. B. 893, at p. 900.

(d) The wording of the old Act was "any matter arising under this Act;" on this it was decided to be immaterial that no action could be maintained at common law, *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 68. Under the old section it was held that an action might be brought for collateral damage, or for anything beyond and apart from the provisions of the Act, *Crofts v. Haldane*, L. R. 2 Q. B. 194. See also *Dodd v. Holme*, 1 A. & E. 493; *Warburton v. London and Blackwall Ry. Co.*, 1 Rail. Ca. 558; *Bower v. Peate*, 1 Q. B. D. 321; *Dalton v. Angus*, 6 A. C. 340; *Lemaitre v. Davis*, 19 Ch. D. 281; *Stone and Hastie, In re* (1903), 2 K. B. 463; *Leadbetter v. Marylebone Corp.* (No. 1) (1904), 2 K. B. 893, cited in the notes to s. 90, *ante*; and *Fisfoot v. Apperley*, *Building News*, September 18, 1903; and *Leadbetter v. Marylebone Corp.* (No. 2) (1905), 1 K. B. 661. Surveyors can award compensation for structural damage but not for trade damage, *Adams v. Mayor of St. Marylebone*, 22 T. L. R. 820. This case was under appeal at the date of publication of this work.

(e) *Quere*, whether these proceedings are within the Arbitration Act, 1889. In *Ex parte McBryde* (4 Ch. D. 200), Malins, V.-C., appointed an umpire, the surveyors refusing to do so, although there was an action pending to settle the right of one of the parties to an ancient light in the party wall as to which the differences had arisen.

(5) If the appellant from any such award (g) on appearing before the county court declare his unwillingness to have the matter decided by that court and prove to the satisfaction of the judge of that court that in the event of the matter being decided against him he will be liable to pay a sum exclusive of costs exceeding £50 and gives security to be approved by the judge duly to prosecute his appeal and to abide the event thereof all proceedings in the county court shall thereupon be stayed and the appellant may bring an action in the High Court against the other party to the difference.

(6) The plaintiff in such action shall deliver to the defendants an issue whereby the matters in difference between them may be tried and the form of such issue in case of dispute or in case of the non-appearance of the defendant shall be settled by the High Court and such action shall be prosecuted and issue tried in the same manner and subject to the same incidents in and subject to which actions are prosecuted and issues tried in other cases within the jurisdiction of the High Court or as near thereto as circumstances admit.

(7) If the parties to any such action agree as to the facts a special case may be stated for the opinion of the High Court and any case so stated may be brought before the court in like manner and subject to the same incidents in and subject to which other special cases are brought before such court or as near thereto as circumstances admit and any costs that may have been incurred in the county court by the parties to such action as is mentioned in this section shall be deemed to be costs incurred in such action and be payable accordingly.

(8) Where both parties to the difference have concurred in the appointment of one surveyor for the settlement of such difference then if such surveyor refuse or for seven days neglect to act or die or become incapable to act before he has made his award the matters in dispute shall be determined in the same manner as if such single surveyor had not been appointed.

(9) Where each party to the difference has appointed a surveyor for the settlement of the difference and a third surveyor has been selected then if such third surveyor refuse or for seven days neglect to act or before such difference is settled die or become incapable to act the two surveyors shall forthwith select another third surveyor in his place (h) and every third surveyor so selected as last aforesaid shall have the same powers and authorities as were invested his predecessor.

(10) Where each party to the difference has appointed a surveyor for the settlement of the difference then if the two surveyors so appointed refuse or for seven days after request of either party neglect to select a third surveyor or another third surveyor in the event of the refusal or neglect to act death or incapacity of the third surveyor for the time being a Secretary of State may on the application of either party (i) select some fit person to act as third surveyor and every surveyor so selected shall have the same powers and authorities as if he had been selected by the two surveyors appointed by the parties.

(11) Where each party to the difference has appointed a surveyor for the settlement of the difference then if before such difference is settled either surveyor so appointed die or become incapable to act the party by whom such surveyor was appointed may appoint in writing some other surveyor to act in his place and if for the space of seven days after notice served on him by the other party for that purpose he fail to do so the other surveyor may proceed *ex parte* and the decision of such other surveyor shall be as effectual as if he had been a single surveyor in whose appointment both parties had concurred and every surveyor so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former surveyor at the time of his death or disability as aforesaid.

(12) Where each party to the difference has appointed a surveyor for the settlement of the difference then if either of the surveyors refuse or for seven days neglect to act the other surveyor may proceed *ex parte* and the decision of such other surveyor shall be as effectual as if he had been a single surveyor in whose appointment both parties had concurred.

(g) As to appeal from the county court, see s. 162, and *Scawell v. Webster*, 29 L. J. Ch. 71.

(h) See F. XLIII., *ante*, p. 462.

(i) See F. XLIV., *ante*, p. 462.

92. (j) Power for building owner to enter premises.] (k)—A building owner his servants agents and workmen at all usual times of working may enter and remain on any premises for the purpose of executing and may execute any work which he has become entitled or is required in pursuance of this Act to execute removing any furniture or doing any other thing which may be necessary and if the premises are closed he and they may accompanied by a constable or other officer of the peace break open any fences or doors in order to effect such entry :

Provided that before entering on any premises for the purposes of this section the building owner shall except in the case of emergency give 14 days' notice of his intention so to do to the owner and occupier and in case of emergency shall give such notice as may be reasonably practicable.

93. (l) Building owner to underpin adjoining owner's building.]—Where a building owner intends to erect within 10 ft. of a building belonging to an adjoining owner a building or structure any part of which within such 10 ft. extends to a lower level than the foundations of the building belonging to the adjoining owner he may and if required by the adjoining owner shall (subject as hereinafter provided) (m) underpin or otherwise strengthen the foundations of the said building so far as may be necessary and the following provisions shall have effect :—

- (1) At least two months' notice in writing shall be given by the building owner to the adjoining owner stating his intention to build and whether he proposes to underpin or otherwise strengthen the foundations of the said building and such notice shall be accompanied by a plan and sections showing the site of the proposed building and the depth to which he proposes to excavate :
- (2) If the adjoining owner shall within 14 days after being served with such notice give a counter notice in writing that he disputes the necessity of or require such underpinning or strengthening a difference shall be deemed to have arisen between the building owner and the adjoining owner :
- (3) The building owner shall be liable to compensate the adjoining owner and occupier for any inconvenience loss or damage which may result to them by reason of the exercise of the powers conferred by this section :—
- (4) Nothing in this section contained shall relieve the building owner from any liability to which he would otherwise be subject in case of injury caused by his building operations to the adjoining owner. (o)

94. (p) Security to be given by building owner and adjoining owner.]—An adjoining owner may if he think fit by notice in writing require the building owner (before commencing any work which he may be authorised by this Part of this Act to execute) to give such security as may be agreed upon or in case of difference may be settled by the Judge of the County Court (q) for the payment of all such expenses costs and compensation in respect of the work as may be payable by the building owner.

The building owner may if he think fit at any time after service on him of a party wall or party structure requisition by the adjoining owner and before beginning a work to which the requisition relates but not afterwards serve a counter requisition on the adjoining owner requiring him to give such security for payment of the expenses costs and compensation for which he is or will be liable as may be agreed upon or in case of difference may be settled as aforesaid.

(j) Re-enacting 18 & 19 Vict. c. 122, s. 86.

(k) See *Wheeler v. Gray*, 6 C. B. N. S. 606.

(l) As to the common law rights of adjoining owners against the building owner and his contractors, see *ante*, Chap. XXV., on Support. This section is new.

(m) See s. 101, *post*.

(o) Thus the section does not interfere with the common law right of support. See, for instance, *Bradbee v. Governors of Christ's Hospital*, 11 L. J. C. P. 209.

(p) Re-enacting 18 & 19 Vict. c. 122, s. 87.

(q) See *Beadnell v. Beeson*, L. R. 3 Q. B. 443, and County Court Rules, 1903, Or. L., as to the jurisdiction of the county court judge.

If the adjoining owner do not within one month after service of that counter requisition give security accordingly he shall at the end of that month be deemed to have ceased to be entitled to compliance with his party wall or party structure requisition and the building owner may proceed as if no party wall or party structure requisition had been served on him by the adjoining owner.

95. (r) Rules as to expenses in respect of party structures.]—(1) As to expenses to be borne jointly by the building owner and adjoining owner:—

- (a) If any party structure be defective or out of repair the expense of making good underpinning or repairing the same shall be borne by the building owner and adjoining owner in due proportion regard being had to the use that each owner makes or may make of the structure;
 - (b) If any party structure be pulled down and rebuilt by reason of its being so far defective or out of repair as to make it necessary or desirable to pull it down the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion regard being had to the use that each owner may make of the structure; (s)
 - (c) If any timber or other partition dividing a building be pulled down in exercise of the right by this Part of this Act vested in a building owner and a party structure be built instead thereof the expense of building such party structure and also of building any additional party structures that may be required by reason of the partition having been pulled down shall be borne by the building owner and adjoining owner in due proportion regard being had to the use that each owner may make of the party structure and to the thickness required for support of the respective buildings parted thereby;
 - (d) If any rooms or storeys or any parts thereof of the property of different owners and intermixed in any building be pulled down in pursuance of the right by this Part of this Act vested in a building owner and be rebuilt in conformity with this Act the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion regard being had to the use that each owner may make of such rooms or storeys;
 - (e) If any arches or communications over public ways or over passages belonging to other persons than the owners of the buildings connected by such arches or communications or any parts thereof be pulled down in pursuance of the right by this Part of this Act vested in a building owner and be rebuilt in conformity with this Act the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion regard being had to the use that each owner may make of such arches or communications.
- (2) As to expense to be borne by the building owner (t):—
- (a) If any party structure or any external wall built against another external wall be raised or underpinned in pursuance of the power by this Part of this Act vested in a building owner the expense of raising or underpinning the same and of making good all damage occasioned thereby and of carrying up to the requisite height all such chimneys and chimney-stacks belonging to the adjoining owner on or against any such party structure or external wall as are by this Part of this Act required to be made good and carried up shall be borne by the building owner;
 - (b) If any party structure which is of proper materials and sound and so far

(r) Re-enacting 18 & 19 Vict. c. 122, s. 88. "The provisions of the Act appear to me to contemplate that the recoupment shall be to the owner . . . at whose expense the wall was raised, and not of any one else." *Per Collins, M.R., in Stone and Hester, In re* (1901), 2 K. H., at pp. 473, 474.

(s) See *Knight v. Purcell*, 11 Q.B. 10, 412, as to what wall be held to be a party wall within this sub-section.

(t) See note (g), p. 535.

defective or out of repair as to make it necessary or desirable to pull it down be pulled down and rebuilt by the building owner the expense of pulling down and rebuilding the same and of making good any damage by this Part of this Act required to be made good and a fair allowance in respect of the disturbance and inconvenience caused to the adjoining owner shall be borne by the building owner (*u*);

- (c) If any party structure be cut into by the building owner the expense of cutting into the same and of making good any damage by this Part of this Act required to be made good shall be borne by such building owner;
- (d) If any footing chimney breast jambs or floor be cut away in pursuance of the powers by this Part of this Act vested in a building owner the expense of such cutting away and of making good any damage by this Part of this Act required to be made good shall be borne by the building owner;
- (e) If any party fence wall be raised for a building the expense of raising such wall shall be borne by the building owner;
- (f) If any party fence wall be pulled down and built as a party wall the expense of pulling down such party fence wall and building the same as a party wall shall be borne by the building owner.

If at any time the adjoining owner make use of any party structure (*w*) or external wall (or any part thereof) raised or underpinned as aforesaid or of any party fence wall pulled down and built as a party wall (or any part thereof) beyond the use thereof made by him before the alteration there shall be borne by the adjoining owner from time to time a due proportion of the expenses (having regard to the use that the adjoining owner may make thereof):—

- (i) Of raising or underpinning such party structure or external wall and of making good all such damage occasioned thereby to the adjoining owner and of carrying up to the requisite height all such flues and chimney-stacks belonging to the adjoining owner on or against any such party structure or external wall as are by this Part of this Act required to be made good and carried up;
- (ii) Of pulling down and building such party fence wall as a party wall.

96. (x) Account of expenses to be delivered to adjoining owner.]—Within one month after the completion of any work which a building owner is by this Part of this Act authorised or required to execute and the expense of which is in whole or in part to be borne by an adjoining owner the building owner shall deliver to the adjoining owner an account (*y*) in writing of the particulars and expense of the work specifying any deduction to which such adjoining owner or other person may be entitled in respect of old materials or in other respects and every such work shall be estimated and valued at fair average rates and prices according to the nature of the work and the locality and the market price of materials and labour at the time.

97. (z) Adjoining owner may object to account.]—At any time within one month after the delivery of the said account the adjoining owner if dissatisfied therewith may declare his dissatisfaction to the building owner by notice in writing served (*a*) by himself or his agent and specifying his objection thereto and thereupon a difference shall be deemed to have arisen between the parties and shall be determined

(*u*) See *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 68; *Bryer v. Willis*, 23 L. T. 463.

(*w*) This part of the section does not deal with an alteration of or addition to a party wall, but with claims to make a greater use of a party wall of dimensions already fixed, in which cases provision as to the mode in which the expenses are to be borne is made by the section. See *per Collins, M.R.*, in *Leadbetter v. Marylebone Corp.* (No. 1) (1904), 1 K. B. 893, at p. 901. See also *In re Stone and Hastie* (1903), 2 K. B. 463, at p. 473.

(*x*) Re-enacting 18 & 19 Vict. c. 122, s. 89.

(*y*) Under the old Act, 14 Geo. III. c. 78, see *Philp v. Donati*, 2 Taunt. 62.

(*z*) Re-enacting 18 & 19 Vict. c. 122, s. 90.

(*a*) See s. 188, *post*, p. 538.

in manner hereinafter in this Part of this Act (b) provided for the settlement of differences between building and adjoining owners.

98. (c) *Building owner may recover if no appeal made.*—If within the said period of one month the adjoining owner do not declare in the said manner his dissatisfaction with the account he shall be deemed to have accepted the same and shall pay the same on demand to the party delivering the account and if he fail to do so the amount so due may be recovered as a debt.

99. (d) *Structure to belong to building owner until contribution paid.*—Where the adjoining owner is liable to contribute to the expenses of building any party structure then until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure.

100. (e) *Adjoining owner liable to expenses incurred on his requisition.*—The adjoining owner shall be liable for all expenses incurred on his requisition by the building owner and in default payment of the same may be recovered from him as a debt.

101. (f) *Saving for rights in party walls, &c.*—Nothing in this Act shall authorise any interference with an easement of light or other easements in or relating to a party wall or take away a bridge or prejudicially affect any right of any person to preserve or restore any light or other thing in or connected with a party wall in case of the party wall being pulled down or rebuilt.

PART IX.

DANGEROUS AND NEGLECTED STRUCTURES. (g)

Dangerous Structures.

102. (h) *Meaning of "structure."*—In this Part of this Act the expression "structure" includes any building wall or other structure and anything affixed to or projecting from any building wall or other structure.

103. (i) *Survey to be made of dangerous structures.*—(1) Where it is made known to the Council that any structure is in a dangerous state (k) the Council shall require a survey of such structure to be made by the district surveyor or by some other competent surveyor.

(2) For the purposes of this Part of this Act the expression "district surveyor" shall be deemed to include any surveyor so appointed.

(3) The district surveyor shall make known to the Council any information which he may receive with respect to any structure being in a dangerous state.

(4) It shall be lawful for the district surveyor to enter into any structure or upon

(h) See s. 91, *ante*.

(i) Re-enacting 18 & 19 Vict. c. 122, s. 91.

(j) *Ib.*, s. 92.

(k) *Ib.*, s. 93.

(l) This section embodies the decision in *Crofts v. Hablance*, L. R. 2 Q. B. 194.

(g) See *Isdenham v. Metropolitan Bd. of W.*, 6 Q. B. D. 112; *L. C. C. v. Herring*, [1894] 2 Q. B. 522. The duties of the county council under this part may be delegated to their superintending architect, *L. C. C. v. Hobbs* (1897), 75 L. T. 687. See also *Crisp v. L. C. C.* (1899), 1 Q. B. 720.

(h) Re-enacting 18 & 19 Vict. c. 122, s. 69.

(i) Re-enacting 18 & 19 Vict. c. 122, s. 69; 32 & 33 Vict. c. 82, s. 4.

(j) As to liability of landlord for injuries caused to tenant by defective condition of premises, see *Tredway v. Mackay*, 91 L. T. 310.

any land upon which any structure is situate for the purpose of making a survey of such structure.

[104. (l) Effect of this Part of Act within the City.]

105. (m) *Surveyor to give certificate.*—Upon the completion of his survey the district surveyor employed shall certify (n) to the Council his opinion as to the state of the structure.

106. (o) *Notice to be given to owner in respect of certificate.*—If the certificate is to the effect that the structure is not in a dangerous state no further proceedings shall be in respect thereof but if it is to the effect that the same is in a dangerous state the Council may cause the same to be shored up or otherwise secured and a proper hoard or fence (p) to be put up for the protection of passengers and shall cause notice to be served on the owner (q) or occupier of the structure requiring him forthwith to take down secure or repair the same as the case requires.

107. (r) *Proceedings to enforce compliance with notice.*—(1) If the owner (s) or occupier on whom the notice is served (t) fail to comply as speedily as the nature of the case permits with the notice a petty sessional court (u) on complaint (w) by the Council may order the owner (x) to take down repair or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the court to be in a dangerous state within a time to be fixed by the order (y) and if the same be not taken down repaired or otherwise secured within the time so limited the Council may with all convenient speed cause all or so much of the structure as is in a dangerous condition to be taken down repaired or otherwise secured in such manner as may be requisite:

Provided that if the owner of the structure dispute the necessity of any of the requisitions comprised in the notice he may by notice in writing to the Council within seven days from the service of the notice upon himself require that the subject shall be referred to arbitration.

(2) In case the owner require arbitration he may at the time of giving such notice appoint an independent surveyor (z) to report on the condition of the structure in conjunction with the district surveyor within seven days of the receipt by the Council of the notice of appointment of the owner's surveyor and all questions of fact or matters in dispute which cannot be agreed between the owner's surveyor and the district surveyor shall be referred for final decision to a third surveyor who shall

(l) Re-enacting 18 & 19 Vict. c. 122, ss. 70, 75.

(m) *Ib.*, s. 71.

(n) In writing, see s. 187 (1), *post*.

(o) This and the next apply even when the building is not adjacent to a highway nor dangerous to the public; it is sufficient if the structure be dangerous to the inmates. See *L. C. C. v. Herring* (1894), 2 Q. B. 522, *supra*. See also *Barrett v. Metropolitan Bd. of W.*, 46 L. T. N. S. 384. This section re-enacts 18 & 19 Vict. c. 122, s. 72.

(p) See *Bradbee v. Mayor of London*, 4 M. & G. 714, as to the custom of the City of London to put up hoards to protect passengers.

(q) It is not necessary to serve all the owners of dangerous party structures, *Debenham v. Met. Bd. of W.*, 6 Q. B. D. 112, *supra*.

(r) Re-enacting 18 & 19 Vict. c. 122, s. 73.

(s) *Wigg v. Lefevre*, 8 T. L. R. 493.

(t) See as to service of notice, when owner cannot be found, *R. v. Mead* (1898), 1 Q. B. 110. And see Amendment Act, 1898, s. 4, *post*, p. 557.

(u) See Interpretation Act, 1889, s. 13 (12).

(w) As to time for, see *Morant v. Taylor*, 1 Ex. D. 188; *Bermondsey Vestry v. Johnson*, L. R. 8 C. P. 441.

(x) The old section continued "or in his default the occupier," but these words are not re-enacted.

(y) Under the former enactment it was held that an order to repair was insufficient and bad if it did not contain an averment that the party had been summoned to answer the complaint and that an adjudication had been made that the complaint was true, *Labalmoudiere v. Frost*, 1 El. & El. 527.

(z) If an owner requiring arbitration fail to name a surveyor in his counter requisition the counter requisition drops, *L. C. C. v. Bernstein* (1897), 61 J. P. 630.

(before the owner's surveyor and the district surveyor enter upon the discussion of the question in dispute have been appointed to act as arbitrator by such two surveyors or in the event of their disagreement by a petty sessional court on the application of either of them :

Such arbitrator shall make his award within fourteen days.

(3) The notice served by the Council shall be discharged amended or confirmed in accordance with the decision of the two surveyors or the arbitrator as the case may be.

(4) Unless the arbitrator otherwise direct the costs of and incident to the determination by the two surveyors or the arbitrator of the question in dispute shall be borne and paid in the event of such determination being adverse to the contention of the district surveyor by the Council or in the event of such determination being adverse to the contention of the owner's surveyor by the owner.

108. *Court may make order notwithstanding arbitration.*—Notwithstanding any such notice requiring arbitration as aforesaid a petty sessional court on complaint by the Council may if of opinion that the structure is in such a dangerous condition as to require immediate treatment make any order which such court may think fit with respect to the taking down repairing or otherwise securing the structure.

109. (a) *Expenses.*—(1) All expenses incurred by the Council in relation to the obtaining of any order as to a dangerous structure (b) and carrying the same into effect under this Part of this Act shall be paid by the owner of the structure (c) but without prejudice to his right to recover the same from any person liable to the expense of repairs. (d)

(2) If the owner cannot be found or if on demand he refuse or neglect to pay the said expenses the Council after serving on him three months' notice of their intention to do so may if in their discretion they think fit sell the structure but they shall after deducting from the proceeds of the sale the amount of all expenses incurred by them pay the surplus (if any) to the owner on demand.

110. (f) *Provisions respecting sale of dangerous structures.*—Where under this Part of this Act any dangerous structure is sold for payment of the expenses incurred in respect thereof by the Council the purchaser his agents and servants may enter upon the land whereon the structure is standing for the purpose of taking down the same and of removing the materials of which it is constructed.

111. (f) *If proceeds insufficient land not to be built on till balance paid.*—Where the proceeds of the sale of any such structure are insufficient to repay to the

Re-enacting 18 & 19 Vict. c. 122, s. 73.

(1) Although a summons is withdrawn after the owner has in the meantime duly repaired the structure, the expenses can be recovered, *Metropolitan Bd. of W. v. Flight*, L. R. 9 Q. B. 38.

(2) See *Mowbray v. Labouchere*, 1 E. & F. 533, S. C. sub nom.; *Reg. v. Mowbray*, 3 L. T. S. 108. As to retention of the payment, see *Croft v. L. C. C.* (1899), 1 Q. B. 729; and see note to s. 106, ante.

(3) Expenses incurred by a tenant for life under a will, in repairing structures on a portion of the demised property in conformity with the Act, have been held to constitute a charge on the property, and the proceeds of other lands devised to the same uses, and taken under the Land Charges Act, were considered to be properly applied in their repayment, *Ex parte Jones*, 3 D. G. & J. 144. One owner cannot require that the other owners shall be impleaded in order that the expenses may be distributed among them, *Jebenshaw v. Metropolitan Bd. of W.*, 6 Q. B. 112. The owner cannot object to the expenses of demolition, simply on the ground that they are above the market rates. (4) An example of a person liable would be a tenant under a repairing lease; as to the extent of his liability, see *Luder v. Lake*, [1897] 2 Q. B. 212. An owner may become liable for expenses under this section where the duties of the council have been exercised by one of its officers acting on a general resolution of the council, without the particular matter having come before them for consideration, *L. C. C. v. Higgs*, 61 J. P. 85. As to recovery of expenses by the "owner or occupier" from those who are really liable, see s. 173, post.

(5) The time for recovery by summary proceedings runs from demand and refusal, *Labouchere v. Jackson*, 1 E. & F. 41.

(f) Re-enacting 41 & 42 Vict. c. 32, s. 19.

Council the amount of the expenses incurred by them in respect of such structure no part of the land whereon the structure stands or stood shall be built upon until after the balance due to the Council in respect of the structure has been paid.

112. *Recovery of expenses.*—If the materials are not sold by the Council or if the proceeds of the sale are insufficient to defray the said expenses the Council may recover the expenses or the balance thereof from the owner of the building together with all costs in respect thereof in a summary manner.

113. (g) *Fees to surveyor.*—(1) There shall be paid the district surveyor in respect of his services under this Part of this Act in relation to any dangerous structures the fees specified in Part II. of the Third Schedule to this Act. (h)

(2) Provided that if any special service is required to be performed by the district surveyor under this Part of this Act for which no fee is specified in the said schedule the Council may order such fee to be paid for that service as they think fit.

(3) All fees paid to any surveyor by virtue of this section shall be deemed to be expenses incurred by the Council in the matter of the dangerous structure in respect of which such fees are paid and shall be recoverable by them from the owner accordingly.

114. (i) *Power to remove inmates from dangerous structure.*—Where a structure has been certified by a district surveyor to be dangerous to its inmates a petty sessional court may if satisfied of the correctness of the certificate upon the application of the Council by order direct that any inmates of such structure be removed therefrom by a constable or other peace officer and if they have no other abode he may require that they be received into the workhouse for the place in which the structure is situate.

Neglected Structures.

115. (j) *Removal of dilapidated and neglected buildings.*—(1) Where a structure if ruinous or so far dilapidated as thereby to have become and to be unfit for use or occupation or is from neglect or otherwise in a structural condition prejudicial to the property in or the inhabitants of the neighbourhood a petty sessional court on complaint by the Council may order (k) the owner to take down or repair or rebuild such structure (in this Act referred to as a neglected structure) or any part thereof or to fence in the ground upon which it stands or any part thereof or otherwise to put the same or any part thereof into a state of repair and good condition to the satisfaction of the Council within a reasonable time to be fixed by the order and may also make an order for the costs incurred up to the time of the hearing.

(2) If the order is not obeyed the Council may with all convenient speed enter upon the neglected structure or such ground as aforesaid and execute the order. (l)

(3) Where the order directs the taking down of a neglected structure or any part thereof the Council in executing the order may remove the materials to a convenient place and (unless the expenses of the Council under this section in relation to such structure are paid to them within fourteen days after such removal) sell the same if and as they in their discretion think fit.

(4) All expenses incurred by the Council under this section in relation to a neglected structure may be deducted by the Council out of the proceeds of the sale and the surplus (if any) shall be paid by the Council on demand to the owner of the structure and if such neglected structure or some part thereof is not taken down and such materials are not sold by the Council or if the proceeds of the sale are insufficient to defray the said expenses the Council may recover such expenses or

(g) Re-enacting 18 & 19 Vict. c. 122, s. 77.

(h) See *L. C. C. v. Sheinman* (1905), 93 L. T. 505.

(i) Re-enacting 18 & 19 Vict. c. 122, s. 80.

(j) Re-enacting 45 & 46 Vict. c. 14, s. 17.

(k) As to service of order, see Amendment Act, 1898, s. 5 (*post*, p. 557).

(l) For penalties, see s. 200, *post*, p. 540.

such inofficiency from the owner of the structure together with all costs in respect thereof in a summary manner but without prejudice to his right to recover the same from any lessor or other person liable to the expenses of repairs.

Supplemental as to Dangerous and Neglected Structures.

116. (m) *Provision for enforcing repayment of expenses incurred by Council.*—

(1) Where the Council have incurred any expenses in respect of any dangerous or neglected structure and have not been paid or have not recovered the same a petty sessional court on complaint by the Council may make an order fixing the amount of such expenses and the costs of the proceedings before such petty sessional court and directing that no part of the land upon which such dangerous or neglected structure stands or stood shall be built upon or that no part of such dangerous or neglected structure if repaired or rebuilt shall be let for occupation until after payment to the Council of the said amount and thereupon and until payment to the Council of the said amount no part of such land shall be built upon and no part of such dangerous or neglected structure so repaired or rebuilt shall be let for occupation.

(2) Every such order shall be made in duplicate and one copy of such order shall be retained by the proper officer of the court and the other copy shall be kept at the county hall.

(3) The Council shall keep at the county hall a register of all orders made under this section and shall keep the same open for inspection by all persons at all reasonable times and any such order not entered in such register within ten days after the making thereof shall cease to be of any force. No property shall be affected by any such order unless and until such order is entered in such register. (n)

117. *Fees on dangerous or neglected structures to Council.*—The fees specified in Part IV. of the Third Schedule to this Act as payable to the Council shall be payable to and may be recovered in a summary way by the Council.

PART X. (o)

[118-121.—DANGEROUS AND NOXIOUS BUSINESSES.]

PART XI. (p)

[122-124.—DWELLING HOUSES ON LOW-LYING LAND.]

PART XII. (q)

[125-135.—SKY SIGNS.]

(m) Re-enacting 45 & 46 Vict. c. 14, s. 18.

(n) The last sentence is new, and to some slight extent lessens the hardship which the provisions of this section impose on purchasers.

(o) These provisions were previously contained in the Building Act, 1844. They are of too special a nature to be inserted at length in a general work such as this.

(p) This part re-enacts part of the London Council (General Powers) Act, 1893 (a private Act). The provisions are not of sufficient general application to be included in this work.

(q) The provisions as to sky signs are not thought to be of sufficient importance to be included at length; but it may be stated that after the commencement of the Act, no sky sign can be erected.

PART XIII.

SUPERINTENDING ARCHITECT AND DISTRICT SURVEYORS.

[136. (r) Power of Council to appoint superintending architect.]

[137. (s) Power of superintending architect to appoint deputy.]

138. (t) *Buildings to be supervised by district surveyors.*—Subject to the provisions of this Act and to the exemptions in this Act mentioned every building or structure and every work done to in or upon any building or structure and all matters relating to the width and direction of streets the general line of buildings in streets the provision of open spaces about buildings and the height of buildings shall be subject to the supervision of the district surveyor (u) appointed to the district in which the building or structure is situate.

[139. (w) Powers of Council as to surveyors and districts.]

[140. (x) Examination of candidates for office of surveyor by the Royal Institute of British Architects.]

[141. (y) Surveyor to have an office.]

[142. (z) Power of surveyor to appoint deputy.]

[143. (a) Power to appoint assistant surveyor.]

144. (b) *Surveyor not to act in case of works under his professional superintendence.*—If any building or structure be executed or any work done to in or upon any building or structure by or under the superintendence of any district surveyor acting professionally or on his own private account that surveyor shall not survey such building or structure for the purpose of this Act or act as district surveyor in respect thereof or in any matter connected therewith but it shall be his duty to give notice to the Council who shall then appoint some other district surveyor to act in respect of the matter.

145. (c) *Notices to be given to surveyor by builder.*—In the following cases and at the following times (that is to say):—

(a) Where a building or structure or work (d) is about to be begun then two clear days before it is begun; and

(r) Re-enacting 18 & 19 Vict. c. 122, ss. 62, 64.

(s) *Ib.*, s. 63.

(t) *Ib.*, s. 31.

(u) The district surveyor is a person having a statutory position and a statutory duty cast upon him. He is not a servant of the county council: *Westminster City Council v. Watson* (1902), 2 K. B. 717. It has been held by a metropolitan police magistrate that there is nothing in the terms of the appointment of a district surveyor to warrant his giving permission for any deviation from conditions imposed under the council's seal: *L. C. C. v. Allen and Norris* (1905), *Builder* June 24, p. 690.

(w) Re-enacting 18 & 19 Vict. c. 122, s. 32.

(x) *Ib.*, s. 33.

(y) *Ib.*, s. 34.

(z) *Ib.*, s. 35.

(a) *Ib.*, s. 36.

(b) *Ib.*, s. 37. This section is incorporated with the Amendment Act, 1905 (see s. 27 (1) of that Act).

(c) Re-enacting 18 & 19 Vict. c. 122, s. 38. This section is incorporated with the Amendment Act, 1905 (see s. 27 (1) of that Act). It does not apply to buildings exempted by ss. 201 *et seq.* See *R. v. Jay*, 8 E. & B. 469. Notice must also be given to the local authority as to foundations, buildings, and drains, s. 76 of the Metropolis Management Act, 1855, and s. 63 of the Management Act, 1862.

(d) Removable temporary seating fixed inside a large public hall when required by persons having the hall for show or exhibition, is not a building structure or work within the meaning of this section, *Venner v. McDonnell* (1897), 61 J. P. 181 (and see p. 489, *ante*).

A "street box" used for electric lighting and established in accordance with the terms of

(b) Where a building or structure or work is after the commencement thereof suspended for any period exceeding three months then two clear days before it is resumed; and

(c) Where during the progress of a building or structure or work the builder employed thereon is changed then two clear days before a new builder enters upon the continuance thereof;

the builder or other person causing or directing the work to be executed shall serve on the district surveyor (e) a building notice respecting the building or structure or work. Every building notice shall state the situation area height number of storeys and intended use of the building or structure and the number of buildings or structures if more than one and the particulars of the proposed work and the name and address of the person giving the notice and those of the owner then in possession of and the occupier of the building or structure or of its site or intended site. All works in progress at the same time to in or on the same building or structure may be included in one building notice. (f)

140. [g] *Surveyor to enforce execution of Act.*—Every district surveyor shall (h) upon the receipt of any such notice or of refusal and also upon any work being commenced or made known to him which is affected by the provisions of this Act or by law made thereunder but in respect of which no notice has been given and also from time to time during the progress of any work affected by such provisions and by law as often as may be necessary for securing the due observance of such provisions and bylaws survey any building or work hereby placed under his supervision and cause all such provisions and bylaws to be duly observed.

147. (i) *Notice to be evidence of intended works.*—Every notice served in

a provisional order under the Electric Lighting Acts, 1882 and 1888, is a building structure or work within this section, *Whitechapel B.L. of W. v. Crew*, 65 J. P. 463; *Charing Cross, etc., Electricity Co. v. Woodthorpe* (1901), 88 L. T. 772.

Notice is given to the surveyor in order that he may safeguard the interests which it is his duty to safeguard, *Charing Cross, etc. v. Woodthorpe, supra*.

A temporary floor in a swimming bath, which did not and was not likely to affect the building or swimming bath in which it was constructed, was held not to require a notice, *Hobbs v. Meeson* (1901), 67 J. P. 313.

(e) The duties of district surveyors as to inspection of wooden structures in the metropolis under this section have not been transferred by the London Government Acts, 1899 (62 & 63 Vict. c. 11, s. 5, Sched. II., Pt. I.), to the borough councils and their officers. Notices under s. 145 must therefore still be served upon district surveyors, who are entitled to fees where the case is a proper one for their inspection: *Westminster City Council v. Watson* (1902), 2 K. B. 717.

This point had been left undecided in *Westminster Corporation v. L. C. C.* (1902), 1 K. B. 328, cited in the note to s. 84 (1), *ante*.

In the following cases, which were decided in various metropolitan police courts, notices to the district surveyor have been held to be necessary: Fixing wooden advertisement frames supported on wooden brackets driven into a wall and fixed with iron holdfasts, *Meeson v. Anthony, Butler*, June 21, 1899; fixing a lift in a public building, *Meeson v. Richmond*, *ib.*, March 7, 1899; raising the chancel floor of a church, *Dicksee v. Pullers, ib.*, March 19, 1898; fixing a steam boiler and chimney in a school, *Dicksee v. Live, ib.*, January 27, 1900; construction of floor from a copper, *Dicksee v. Graham, ib.*, February 17, 1900; adding a wooden bathroom to a house, *Marsden v. Thompson, ib.*, October 6 and 27, 1900; fixing a glue heating stove at a piano factory, *Woodhill v. Kent, ib.*, June 13, 1903; fixing new sash to a shop front, *Cornish v. De Koven, ib.*, March 5, 1901; lowering the floor of a bakehouse, necessitating the underpinning of the walls, *Dicksee v. Pearce, ib.*, April 23, 1904; fixing a self-contained cooking range on a marble slab laid on a wooden floor, and with a sheet-iron pan carried through the roof, *Dicksee v. Smith, ib.*, February 26, 1901.

(f) In the case of every new building as defined by s. 6 (1) of the Amendment Act, 1905, which is a "high building" within the meaning of s. 6 (1) (iv.) of that Act, or in which there is sleeping accommodation for more than twenty persons, a notice served under this section must now be accompanied by plans showing the means of escape in case of fire proposed to be provided in connection with such building. See Amendment Act, 1905, s. 7, *post*.

(g) Re-enacting 14 & 19 Vict. c. 122, s. 89.

(h) A mandamus may be granted against a district surveyor who has refused or neglected to enforce the Act, *R. v. Redman*, 6 T. L. R. 9.

(i) Re-enacting 15 & 19 Vict. c. 122, s. 49. This section is incorporated with the Amendment

pursuance of this Act shall be deemed in any question relative to any building structure or work to be *prima facie* evidence as against the builder of the nature of the building structure or work proposed to be built or done.

148. (k) *Power of entry to inspect buildings.*—(1) The district surveyor of any district at all reasonable times during the progress and during fourteen days next after the completion of any building structure or work in such district affected by any of the provisions of this Act or by any byelaws made thereunder or by any terms or conditions on which the observance of any such provisions or byelaws may have been dispensed with may enter and inspect such building structure or work.

(2) The district surveyor may for the purpose of ascertaining whether any buildings erected in those premises are in such a situation or possess such characteristics as are required in order to exempt them from the operation of this Part of this Act at all reasonable times and after reasonable notice enter any premises except buildings exempt from the operation of Parts VI. and VII. of this Act and he may do therein all such things as are reasonably necessary for the above purpose.

149. (l) *In case of emergency works to be commenced without notice.*—Where by reason of any emergency any act or work is required to be done immediately or before notice can be given as aforesaid such act or work may be done on condition that before the expiration of twenty-four hours after it has been begun notice thereof is served on the district surveyor.

150. *As to service of notice of objection on builder or building owner.*—Where it appears from the building notice served on the district surveyor under this Act that it is proposed to erect any building or structure or to do any work to in or upon any building which will be in contravention of this Act or that anything required by this Act is proposed to be omitted the district surveyor shall serve upon the builder or building owner a notice of objection to such proposed erection and in the event of the builder or the building owner being dissatisfied with the decision of the surveyor he may within fourteen days of the date of the notice of objection appeal to a petty sessional court who may make an order either affirming the objection or otherwise. (m)

151. (n) *Notice by surveyor in case of irregularity.*—In any of the following cases (that is to say):—

(a) where in erecting any building or structure or in doing any work to in or upon any building anything is done in contravention of this Act or anything required by this Act is omitted to be done; or

(b) where the district surveyor on surveying or inspecting any building or work in respect of which notice has not been served as required by this Part of this Act finds that the same is so far advanced that he cannot ascertain whether anything has been done in contravention of this Act or whether anything required by this Act has been omitted to be done;

the district surveyor shall serve on the builder (o) engaged in erecting such building or structure or in doing such work a notice (hereinafter referred to as a notice of irregularity) requiring him within forty-eight hours from the date of the notice to cause anything done in contravention of this Act to be amended or to do anything required to be done by this Act which has been omitted to be done or to cause so much of any building structure or work as prevents such district surveyor from

Act, 1905: see s. 27 (1) of that Act. See s. 188, *post*. As to the result of a deviation from plans, see *James v. Masters* (1893), 1 Q. B. 355.

(k) Re-enacting 18 & 19 Vict. c. 122, s. 42; 41 & 42 Vict. c. 32, s. 21.

(l) *Ib.*, s. 44.

(m) As to appeals under this section, see *Dicksee v Hoskins* (1901), 2 K. B. 660; and see note to s. 74 (2), *ante*. See *per Alverstone, C.J.*, in *Goodchild v. Matthews* (1903), 67 J. P. 296, at p. 298. And see *ante*, p. 511.

(n) Re-enacting 18 & 19 Vict. c. 122, s. 45.

(o) As defined in s. 5 (33), *ante*, p. 480.

ascertaining whether anything has been done or omitted to be done at retail to be to a sufficient extent cut into laid open or pulled down.

152. (p) Notice of irregularity after completion of building.—(1) In order to provide for the service of a notice of irregularity after and notwithstanding that the building or structure has ceased to be in charge of or under the control of the builder (q) the following provisions shall have effect:—

(a) If notice in writing shall have been served upon the district surveyor by the builder or owner of the date at which such building has ceased to be in the charge of or under the control of the builder then at any time before the expiration of fourteen days after the service of such notice a notice of irregularity may, if the district surveyor thinks fit, be served on the owner or occupier of the building or structure or other the person causing or directing or who has caused or directed the work instead of or in addition to the builder (if any);

(b) Where no such notice shall have been served upon the district surveyor, a notice of irregularity may at any time within twenty-one days after completion of the building or structure be served on the owner or occupier of the building or structure or other the person causing or directing or who has caused or directed the work instead of or in addition to the builder (if any).

(2) When the owner of the building or structure does not allow the builder to comply with the requisition of a notice of irregularity served on the builder and the builder serves notice on the district surveyor to that effect a notice of irregularity may at any time within fourteen days after service of the notice by the builder on the district surveyor be served on the owner or occupier of the building or structure or other the person causing or directing or who has caused or directed the work instead of or in addition to the builder (if any).

(3) When a notice of irregularity is served under this section the provisions of this Act as to the consequences of such a notice so far as they relate to the builder shall apply to the owner occupier or other person served.

(4) Nothing in this section shall prejudice any remedy of an owner occupier or other person against the builder.

153. (r) Summary proceedings on non-compliance with notice.—(1) If the person on whom the notice of irregularity is served make default in complying with that notice within the period named therein a petty sessional court on complaint made in a summary manner as provided by the Summary Jurisdiction Acts by the district surveyor may make an order on such person requiring him to comply with the notice or with any requisitions therein which may in the opinion of the court be authorized by this Act within a time to be named in the order. (s)

(2) If the order be not complied with (t) the Council may if they think fit after giving seven days' notice to such person enter with a sufficient number of workmen upon the premises and do all such things as may be necessary for enforcing the requisitions of the notice and for bringing any building or work into conformity with the provisions of this Act and all expenses incurred by the Council in so doing may be recovered in a summary way either from the person on whom the order was made or from the owner of the premises.

(p) This section is new and alters the previous law, the old provisions only applying during the time the building was in course of erection, *Smith v. Legg*, [1893] 1 Q. B. 398; *Hallen v. Lister*, [1894] 1 Q. B. 312; *Parsons v. Timewell*, 41 J. P. 296. And it also alters the law laid down in *Bruton v. St. George's (Hanover Square) Vestry*, 13 Eq. 392, as to time for proceeding.

(q) As defined in s. 5 (33), *ante*, p. 480.

(r) Re-enacting 18 & 19 Vict. c. 122, ss. 46, 47; 41 & 42 Vict. c. 32, s. 17.

(s) See *Baumann v. St. Pancras Vestry*, L. R. 2 Q. B. 628, as to an order to demolish buildings.

(t) An allegation that he cannot carry out the notice without committing a trespass will not enable a tenant to escape liability, *Hew v. L. C. C.* (1901), 1 K. B. 540. It is submitted that although a charge be proved, the court may dismiss a case if the offence is of a trifling nature, *East v. Scott Hall* (1903), 2 K. B. 245.

154. (u) *Payments to surveyors for ordinary and special services.*—(1) There shall be paid by the builder or in his default by the owner or occupier as the case may be of the building or structure in respect whereof the same are chargeable to every district surveyor in respect of the several matters mentioned in Parts I. and III. of the Third Schedule to this Act the fees therein specified (w) or such other fees not exceeding the amounts therein specified as may be directed by the Council.

(2) If in consequence of any reduction being made by the Council in the amount of the said fees the income of any existing district surveyor is diminished the Council shall grant to him compensation in respect of such diminution.

[155. Council to pay district surveyor in relation to formation of streets, etc.]

[156. (x) *Fees in relation to evidence before tribunal.*]

[157. *Periods when surveyors entitled to fees.*] (y)

[158. (z) Power of Council to pay salaries to surveyors.]

[159. Council may proceed on behalf of district surveyor.]

Returns by District Surveyors.

[160. Monthly returns by district surveyor to Council.]

[161. Return to be a certificate that works are in accordance with Act.]

[162. Audit of accounts of fees charged by district surveyor.]

[163. District surveyor to notify certain irregularities to the Council.]

PART XIV.

BYELAWS. (a)

164. (b) *Power to Council to make byelaws.*—(1) Subject to the provisions of this Act the Council may make such byelaws not repugnant or contrary to the provisions of this Act as they may think expedient for the better carrying into effect the objects and powers of this Act with respect to the following matters (that is to say) :—

The regulation of the plans level width surface and inclination of new streets and for regulating the plans and level of sites for new buildings; (c)

(u) Re-enacting 18 & 19 Vict. c. 122, ss. 49, 50.

(w) See *Power v. Wignmore*, L. R. 7 C. P. 386, as to fees where arches form a distinct building. See also *Marsland v. Wallis*, 65 J. P. 166.

(x) This section is incorporated with the Amendment Act, 1905. See s. 27 (1) of that Act.

(y) Re-enacting 18 & 19 Vict. c. 122, s. 51. See *Corbett v. Badger* (1901), 2 K. B. 278, as to limitation of time of recovery.

(z) Re-enacting 18 & 19 Vict. c. 122, ss. 65, 67.

(a) As to what may be required by byelaws, see *Anderton v. Birkenhead Commissioners*, 32 L. J. M. C. 137; *Baker v. Mayor of Portsmouth*, 3 Ex. D. 4; *Hall v. Nixon*, L. R. 10 Q. B. 152. As to byelaws made under the repealed Acts, see s. 216, and see also s. 209.

The terms used in byelaws, are *prima facie*, to be taken in the same sense as they bear in the Act itself; *Interpretation Act*, 1889, s. 31; *Blashill v. Chambers*, 14 Q. B. D. 479. See the present byelaws and regulations of the London County Council, *post*, p. 646, *et seq.*

(b) Re-enacting 18 & 19 Vict. c. 120, s. 202; 18 & 19 Vict. c. 122, ss. 55, 59; 41 & 42 Vict. c. 32, s. 16; 53 & 54 Vict. c. cexliiii. s. 31.

(c) See a byelaw made by the Board of Works, and published May 1, 1857.

The forms of notice and other documents to be used for the purposes of this Act and other like matters of procedure;

Foundations and sites of buildings and other erections; (d)

The mode in which and the materials with which such foundations and sites are to be made excavated filled up prepared and completed for securing stability and for purposes of health;

The thickness and the description and quality of the substances of which walls may be constructed (e) for securing stability the prevention of fire and for purposes of health;

The dimensions of wooden frame-work;

The dimensions of joints of floors;

The protection of ironwork used in the construction of buildings from the action of fire;

Work in external walls;

The description and quality of the substances of which plastering may be made; (f)

The mode in which and the materials with which any excavation made within a line drawn outside the external walls of a house building or other erection and at a uniform distance therefrom of three feet shall be filled up;

The regulation of lamps signs or other structures overhanging the public way not being within the City;

Provided that any such byelaws as to the regulation of lamps signs and other overhanging structures shall be administered by the local authority; (g)

The means of escape from fire in buildings exceeding sixty feet in height; (h)

The duties of district surveyors in relation to any byelaws made in pursuance of this section; (i)

The deposit with district surveyors of any plans of buildings submitted for their certificate;

The regulation of the amounts of the fees to be paid to district surveyors in respect of their duties under any such byelaws; (k)

The imposition for every offence (l) committed against any byelaws made under this Act of a penalty not exceeding five pounds and a daily penalty not exceeding two pounds for every day during which such offence continues after conviction. Such penalties to be recovered by summary proceedings.

(2) The Council may provide by any byelaw that in any case in which the Council think it expedient they may dispense with the observance of any byelaw made under this section on such terms and conditions (if any) as they think proper. (m)

(3) No by-law shall have any force or effect unless or until it shall have been submitted to and confirmed at a meeting of the Council subsequent to that at which the bylaw shall have been made nor shall any bylaw have any force or effect until the same shall have been allowed by the Local Government Board.

n (4) See byelaws made by the Council under s. 16 of the Met. Man. Act, 1878 (October 19, 1891), § 2.

(c) *Ib.*, § 3.

(f) See byelaws made by the Council under s. 31 of the L. C. C. (General Powers) Act, 1893, (October 19, 1891), s. 1, p. 644, *post*.

(g) See *L. C. C. v. S. Kewick* (1890), 2 K. H. 605, where the Lord Chief Justice held that the powers given by this paragraph may be used to make byelaws for regulating structures attached to a building and projecting therefrom and used for advertisement purposes.

(h) See s. 63 of this Act, now repealed and replaced by ss. 7, 9 of the London Building Act, 1900, *post*.

(i) See byelaws made by the Council under s. 16 of the Met. Man. Act, 1878 (October 19, 1891), § 4.

(k) *Ib.*, § 5.

(l) See as to "continuing offence," *Pembell v. Adams*, 8 Q. H. D. 603; *L. C. C. v. Worley*, 10 T. L. R. 602; *Met. Bd. v. W. v. Cuthbert*, 54 L. J. M. C. 30.

(m) *Ib.*, s. 7. In the absence of some such clause it would seem that a local authority has no power to sanction a contravention of byelaws. Hence the approval of building plans contravening byelaws has been held illegal and unenforceable, *Fletcher v. King* (1899), 8 Q. B. 414, *followed* *Met. Bd. v. Cuthbert* [supra], *per* Lord L. J. Q. B. 161.

(4) Not less than two months before applying to the Local Government Board for the allowance of any such byelaws the Council shall give such notice of their intended application by advertisement in the London Gazette and otherwise as the Local Government Board shall direct and the Council shall send a copy of the proposed byelaws as approved by them to the local authority the Ecclesiastical Commissioners the Royal Institute of British Architects the Surveyors' Institution the London Chamber of Commerce (Incorporated) and to the Institute of Builders and to such other societies and persons as the Local Government Board may direct and for one month at least before any such application a copy of the proposed byelaws shall be kept at the county hall and shall be open during office hours thereat to inspection without charge.

(5) [*Byelaws to be published and to come into force on day fixed by L. G. B.*](n)

165. (o) *Saving for the City of London.*—No byelaw in respect of any matter from which the City is exempted by this Act or by any Act hereby repealed shall have any force or effect within the City.

PART XV.

LEGAL PROCEEDINGS.

166. (p) *Summary proceedings for offences, etc., and recovery of penalties.*—All offences penalties costs and expenses (q) under this Act or any byelaw made under this Act directed to be prosecuted or recovered in a summary manner or the prosecution or recovery of which is not otherwise provided for may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts. (r)

167. *Proceedings by surveyor.*—Any proceedings taken by a district surveyor may be continued by his duly appointed deputy or successor in the office.

168. (s) *Powers of and appeal from county court.*—Where jurisdiction is by this Act given to a county court (t) that court may settle the time and manner of executing any work or of doing any other thing and may put the parties to the case upon such terms as respects the execution of the work as the court thinks fit:

Provided that any person shall have the same right of appeal from any decision of a county court in any matter in which jurisdiction is given to such court by this Act as he would have under the County Courts Act 1888 from any decision of such court in any matter. (u)

169. (x) *Application of penalties.*—Notwithstanding anything in any other Act one half of all penalties recovered by the Council under this Act shall be paid to the Council. Provided that it shall be lawful for any court by whom any penalty is imposed under this Act to direct that the whole or part thereof shall be applied in or towards payment of the costs of the proceedings.

(n) As to evidence of the due making of a byelaw, see *Robinson v. Gregory* (1905), 1 K. B. 534.

(o) Re-enacting 41 & 42 Vict. c. 32, s. 20.

(p) Re-enacting 18 & 19 Vict. c. 122, s. 103; 45 & 46 Vict. c. 14, s. 22.

(q) Including compensation, in certain cases, see s. 15, *ante*, p. 487.

(r) The Summary Jurisdiction Acts here referred to are (1848) 11 & 12 Vict. c. 43; (1879), 42 & 43 Vict. c. 49; (1884), 47 & 48 Vict. c. 43; (1899), 62 & 63 Vict. c. 22.

(s) Re-enacting 18 & 19 Vict. c. 122, ss. 100, 102.

(t) See ss. 91 (2), 94, and 196.

(u) For penalties for infringing this section, see s. 200 (11), *d. e.*

(x) Re-enacting 18 & 19 Vict. c. 122, s. 104; 53 & 54 Vict. c. ccxliii., s. 40. This section applies to penalties under the Amendment Act, 1905. See s. 24 (3) of that Act.

170. (y) Council may demolish buildings and sell materials and recover expenses.]—Where any person has been convicted of an offence against any of the provisions of any Part of this Act or any byelaw made thereunder by constructing or erecting, adapting, extending, raising, altering, uniting or separating any building or structure or any part of any building or structure in contravention of any provisions of any Part of this Act it shall be lawful for the Council (z) after giving fourteen days' notice to such person to bring such building or structure into conformity with the said provisions and after default shall have been made in complying with such notice and notwithstanding the imposition and recovery of any penalty to cause complaint thereof to be made before a petty sessional court who may thereupon issue a summons requiring the person making such default as aforesaid to appear to answer such complaint and if the said complaint is proved to the satisfaction of the court the court may make an order in writing authorising the Council and it shall thereupon be lawful for the Council to enter upon such building or structure with a sufficient number of workmen and to demolish (a) or alter such building or structure or any part thereof so far as the same shall have been adjudged to be in contravention of this Act or any byelaw under this Act and to do whatever other acts may be necessary for such purpose and to remove the materials to some convenient place and if in their discretion they think fit sell the same in such manner as they may think fit and all expenses incurred by the Council in demolishing or altering such building or structure or any part thereof and in doing such other acts as aforesaid or the balance of such expenses after deducting the proceeds of sale of the aforesaid materials (if the Council thinks fit to sell the same) may be recovered from the person committing the offence aforesaid in a summary manner.

If the proceeds of such sale shall be more than sufficient to defray such expenses the Council shall retain the surplus of such proceeds after deducting the amount of all such expenses to the owner (b) of the building or structure on demand.

171. Procedure by local authorities in case of buildings in advance of general line.]—The powers conferred by this Part of this Act upon the Council with respect to any building or structure in case such building or structure has been erected extended or raised contrary to the provisions of this Act beyond the general line (c) of building in the street place or row of houses in which the same is situate shall extend and apply to and may be exercised by the local authority in like manner as by the Council.

172. [Payment of surplus of proceeds into court.](d)

173. (e) Payment of expenses by owners.]—Where it is by any provision of this

(y) Re-enacting 25 & 26 Vict. c. 102, s. 75; 41 & 42 Vict. c. 32, s. 17; 45 & 46 Vict. c. 14, s. 2, 10.

(z) By s. 5 of the London Government Act, 1899, the power conferred by this section may be exercised by the Borough Councils within their own districts. Certain powers, e.g. those relating to works, structures, s. 84, sky-lights, s. 134, and street obstructions (s. 159), have been transferred entirely to those bodies. See the notes to these sections. The powers conferred by this section upon the Council with reference to structures extending beyond the general line may be exercised by the local authority, see s. 171, *post*.

(a) The power to demolish a building in case of a conviction for an offence against the Act or byelaws made under it, may be exercised by the County Council, or, if the borough council have obtained the conviction, by the borough council, L. G. A., 1899, s. 5 (2), and Sched. II., Part II.

(b) As to the course to be adopted where the owner cannot be found, see s. 172, *infra*.

(c) See s. 22 (1) and note thereto.

(d) Re-enacting 18 & 19 Vict. c. 123, s. 76.

(e) Re-enacting s. 97 (1) of the Metropolitan Building Act, 1855. The object of this section is to enable the county council to recover expenses from the person who is most easily accessible. Before the passing of the Metropolitan Building Act, 1855, the following cases were decided with respect to the recovery of expenses, and the liability to contribution under 14 Geo. III. c. 74. The owner of the improved rent, not of the ground rent, was liable, *Peck v. Wood*, 5 T. R. 170. The lessor of a house at rack rent, though the lessee had improved the house and there being no other person entitled to any kind of rent, was liable, *Lord v. Lord*, 8 T. R. 211. A lessee at a rack rent who covenanted to pay

Act declared that expenses are to be borne by or may be recovered from the owner of any premises (including under the term "owner" the adjoining and building owners respectively) the following rules shall be observed with respect to the payment of those expenses:—

- (1) The owner immediately entitled in possession to the premises or the occupier thereof shall in the first instance pay the expenses with this limitation that an occupier shall not be liable to pay any sum exceeding in amount the rent due or that will thereafter accrue due from him in respect of the premises during the period of his occupancy; (*f*)
- (2) If there are successive owners each of them shall be liable to contribute to the expenses in proportion to his interest; (*g*)
- (3) Any difference arising as to the amount of contribution shall be decided by arbitration;
- (4) If some of the owners liable to contribution cannot be found the deficiency so arising shall be divided amongst the owners who can be found;
- (5) Any occupier of premises who has paid any such expenses may deduct the amount so paid from any rent payable by him to any owner of the same premises and any owner who has paid more than his due proportion of any such expenses may deduct the amount so overpaid from any rent payable by him to any other owner of the same premises; (*h*)
- (6) If default is made by any person in payment of any expenses payable by him in the first instance under this section the same may be recovered in a summary way and if default is made by any person in repaying to any other person any money recoverable under this section such moneys may be recovered in the same manner as if the obligation to pay such moneys were a simple contract debt.

all taxes, rates, etc., and assigned his term for a small sum in gross, was not liable, *Southall v. Leadbetter*, 3 T. R. 458. Nor was the assignee of the lessee who considerably improved the premises and thereby rendered them of greater annual value, *Lambe v. Menans*, 2 B. & Ald. 467. Nor was a tenant who without a lease, or an agreement for a lease, rebuilt a house making use of the party wall of the adjoining house, though he afterwards obtained a beneficial lease in consideration of the rebuilding, *habendum* from a day before the rebuilding, *Taylor v. Reed*, 6 Taunt. 249. But see *Saugster v. Birkhead*, 1 B. & P. 303, where the lessee of a house at rack rent who underlet it at an advanced rent was liable to contribute. See also *Williams v. Pocklington*, 2 B. & Ad. 878, as to a sub-tenant. See *Ex parte Overseers of Saffron Hill*, 24 L. J. M. C. 56, decided under s. 42 of 7 & 8 Vict. c. 84.

Whatever doubt there may be as to whether a general covenant to repair makes the tenant liable to pay expenses as to repair of party walls (*Moore v. Clark*, 5 Taunt. 90), if the covenant to repair also included all party walls and it was the intention that the landlord should receive a clear rent in net money without any deduction, the tenant, and not the landlord, will be bound to pay such expenses, *Barrett v. Bedford (Duke of)*, 8 T. R. 602. A tenant, however, under a covenant to repair could not maintain an action against his landlord for a moiety of expenses of rebuilding a party wall, which he had voluntarily done, giving notice, in his landlord's name, to the occupier of the adjoining house, but without his authority, *Pizey v. Rogers*, Ry. & M. 357. See also *Robinson v. Lewis*, 10 East, 227, as to the tenant not being able to recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance. See as to recovering a share of expenses without reference to the statute, or where there is a special agreement, *Stuart v. Smith*, 2 Marsh. 435, and *Collins v. Wilson*, 4 Bing. 551. See also *Thacker v. Wilson*, 4 N. & M. 659; also *Hornidge v. Wilson*, 11 A. & E. 645; *Debenham v. Met. Bd. of W.*, 6 Q. B. D. 112.

(*f*) It will be seen from this sub-section that in the case of an occupier who holds under a long lease he will be practically bound to pay all the expenses. He may recover from persons liable to contribute as if he were suing for a civil debt. See s.s. (6), *infra*.

(*g*) Where an owner who occupied the ground floor, having let the upper floors on lease, sought to recover the costs of pulling down and rebuilding a dangerous party wall, he obtained judgment for the cost of pulling down and rebuilding, it being found as a fact that the condition of the ground-floor portion was the cause of the whole wall being taken down, *Cave v. Robinson*, *Builder*, March 28, 1903.

(*h*) This section does not prevent the occupier suing for the amount which he has paid on behalf of the party liable. It merely gives him an alternative remedy, *Erle v. Maugham*, 14 C. B. N. S. 626. See s.s. (6). Unlike ss. 96-97 of the Metropolis Management Amendment Act, 1862, this sub-section is silent as to any contract existing between landlord and tenant.

174. *As to periods for giving consents, etc., expiring in vacations.*—Where the period within which for the purposes of this Act any sanction or consent approval or allowance in respect of any matters arising under Parts II. or V. of this Act (i) is to be given or refused by the Council or within which any objection is to be made or other Act done by the Council would expire on any day between the eighth day of August and the fourteenth day of September (both inclusive) such period shall be deemed to be extended for twenty-eight days.

Tribunal of Appeal. (k)

175. *Constitution of tribunal of appeal.*—For the purposes of this Act a tribunal of appeal shall be constituted as follows:—

One member shall be appointed by a Secretary of State;

One member shall be appointed by the Council of the Royal Institute of British Architects;

One member shall be appointed by the council of the Surveyors' Institution;

No member or officer of the Council shall be a member of the tribunal of appeal.

176. *[Duration of office.]*

177. *[Renewal of members.]*

178. *[Vacancies to be supplied.]*

179. *[Remuneration of members of tribunal.]*

180. *[Officers, etc., of tribunal.]*

181. *[Power of Council to support decisions of officers before tribunal.]*—It shall be lawful for the Council to defray the expenses of supporting any decision of the Council or of the superintending architect (m) or of their engineer or of a district surveyor by counsel and witnesses before the tribunal.

182. *Tribunal may state case for opinion of High Court.*—It shall be lawful for the tribunal at any time to state and the tribunal shall if ordered by the High Court or a judge thereof on an application in a summary manner made by any party at the appeal state a case for the opinion of the High Court on any question of law involved in any appeal submitted to them. The High Court shall hear and determine the question or questions of law arising on any case stated by the tribunal of appeal and shall thereupon reverse affirm or amend the determination (if any) in respect of which the case has been stated or remit the matter to the tribunal of appeal with the opinion of the court on the case stated or may make such other order in relation to the matter as the circumstances of the case require and may make such order as to the costs of the case and in the High Court as to the court may seem fit.

183. *Procedure of tribunal.*—The tribunal of appeal shall subject to the provisions of this Act have jurisdiction and power to hear and determine appeals referred to them under this Act. (n)

(i) See s. 9 (as to formation and widening of streets), s. 10 (as to adaptation of ways for streets).

(k) First established by 53 & 54 Vict. c. cxxvi. s. 18, and 56 & 57 Vict. c. cxxxi. s. 6.

(l) This section and ss. 182-185 are incorporated with the Amendment Act, 1905. See s. 27 (1) of that Act.

(m) The tribunal has power to revise the decision of the superintending architect, not only as to the general line of buildings in a street, but also as to the length of street to be taken for which such line is to be defined. It also has power to award a lump sum for costs. *Re London Building Act, 1894, and the L. C. C. 1894*, 21 L. T. 301.

(n) The tribunal also has power to hear appeals under certain sections of the London Building Act Amendment Act, 1905.

For all the purposes of and incidental to the hearing and determination of any appeal the tribunal shall subject to any rules of procedure duly made have power to hear the Council and the parties interested either in person or by counsel solicitor or agent as they may think fit and to administer oaths and to hear and receive evidence and to require the production of any documents or books and to confirm or reverse or vary any decision and make any such order as they may think fit and the costs (o) of any of the parties to the appeal including the Council shall be in the discretion of the tribunal.

184. (p) *Regulations as to procedure and fees.*—The tribunal of appeal may from time to time subject to the approval of the Lord Chancellor make regulations consistent with the provisions of this Act as to the procedure to be followed in cases of appeal to the tribunal including the time and notice of appeal and as to fees to be paid by appellants and other parties.

185. *Enforcement of decision of tribunal.*—Any order of the tribunal of appeal may be enforced by the High Court as if it had been an order of that court.

[186. Fees, etc., to be paid to Council. Expenses.]

Notices.

187. (q) *Notices to be in writing.*—(1) Notices orders and other such documents under this Act shall be in writing (r) and notices and documents other than orders when issued by the Council shall be sufficiently authenticated if signed by their clerk or by the officer by whom the same are given or served.

(2) Orders shall be under the seal of the Council.

188. (s) *Service of notices.*—(1) Any notice (t) order or other document required or authorised to be served under this Act the service of which is not provided for by the Summary Jurisdiction Acts the Lands Clauses Acts (u) or the Companies Clauses Consolidation Act 1845 may be served by delivering a copy thereof at or by sending a copy thereof by post in a registered letter to the usual or last known residence in the United Kingdom of the person to whom it is addressed or by delivering the same to some person on the premises to which it relates or if no person be found on the premises then by fixing a copy thereof on some conspicuous part of the building to which it relates and in the case of a railway company by delivering a copy thereof to the secretary at the principal office of the said company. (x)

(2) Any notice (t) order or other document to be served upon a builder shall be deemed to be sufficiently served if posted in a registered letter addressed to such builder at the place of address stated in his building notice (if any) or in default thereof at his office or any one of his principal offices or if a copy thereof be fixed on some conspicuous part of the building to which it relates.

(3) Any notice by this Act required to be given to or served on the owner or

(o) Note that costs are in the discretion of the tribunal. They do not necessarily follow the event.

(p) Rules have been made under this section. These rules apply to appeals under the Amendment Act, 1905. See s. 27 (1) of that Act. The office of the tribunal is No. 13A, Great George Street, Westminster, S.W. The hearing of appeals is open to the public.

(q) This section and s. 188 are incorporated with the Amendment Act, 1905. See s. 27 (1) of that Act.

(r) "Writing" includes printing, lithography, etc.; Interpretation Act, 1889, s. 20.

(s) Re-enacting 18 & 19 Vict. c. 122, ss. 74, 85, 98; 45 & 46 Vict. c. 14, s. 19.

(t) This section does not apply to any notice, summons, or order to be served upon the owner or occupier of a dangerous or neglected structure, *London Building Act, 1894, Amendment Act, 1898, s. 5, q.v., post, p. 557.*

(u) See Lands Clauses Act, 1845, s. 134.

(v) As to service on railway companies, see s. 188 (1), *post*.

occupier of any premises may be addressed by the description of the "owner" or "occupier" of the premises (naming the premises) in respect of which the notice is given or served without further name or description. (y)

(4) Any notice required by this Act to be served on a district surveyor may be served on him by post in a registered letter addressed to him at his office or by leaving the same at his office.

PART XVI.

MISCELLANEOUS.

[180 (z) Expenses of Council how borne.]

180. (a) *Power of Council to annex conditions.*—In any case where the Council are authorised under this Act to refuse their sanction consent or allowance to the doing or omission of any act or thing the Council may if they think fit instead of refusing such sanction consent or allowance give the same subject to such terms and conditions in relation to the subject matter of such sanction consent or allowance as the Council think fit. (b) Any such term or condition when accepted shall be binding on the owner and occupier of the building or structure or ground to which the sanction consent or allowance relates and if at any time any term or condition so accepted is not observed or fulfilled the owner or occupier in default shall be subject to a penalty as hereinafter provided. (c)

[191. As to buildings of historical history.]

192. (d) *Power of entry to owner, etc., to execute work.*—Any owner builder or other person and his servants workmen and agents may for the purpose of complying with any notice or order served or made on him in pursuance of this Act in respect of any building or structure room or place after giving seven days' notice to the occupier thereof and on production of the first-mentioned notice or order enter and from time to time without further notice re-enter such building or structure room or place and do all necessary works and things therein thereto or in connection therewith.

193. (e) *Limitation of time for proceedings where notice not given.*—Where any building has been erected or work done without due notice having been given to the district surveyor (in accordance with this Act or a byelaw made under this Act) the district surveyor may at any time within one month after he has discovered that such building has been erected or work done enter the premises for the purpose of seeing that the provisions of this Act or any notice served or order made under the same have been complied with and the time (f) during which the district surveyor may

(y) This does not appear to apply to a summons; see *R. v. Mead*, [1891] 2 Q. B. 121; *Truman v. Kerslake*, [1891] 2 Q. B. 774.

(a) Re-enacting 18 & 19 Vict. c. 122, s. 69; 2 & 33 Vict. c. 82, s. 5. See *Metropolitan Bd. of W. v. Frost*, L. R. 9 Q. B. 48.

(a) Re-enacting 25 & 26 Vict. c. 103, s. 76; 45 & 46 Vict. c. 14, s. 9. This section is incorporated with the Amendment Act, 1905. See s. 27 (1) of that Act, *post*.

(b) Apparently the reasonableness of the conditions is not subject to review by the Courts; see *Stroud v. Wandsworth District Bd. of W.*, [1891] 1 Q. B. 371; 2 Q. B. 1; except, perhaps, in cases where no appeal to the tribunal of appeal exists, *L. C. C. v. Best*, 9 T. L. R. 499. For penalties, see s. 200 (1) (a), (10), *post*, pp. 541, 542.

(c) See s. 200 (10), *post*, which makes provision for penalties.

(d) Re-enacting 41 & 42 Vict. c. 32, s. 22. This section was rendered necessary by the cases of *Smith v. Legg* (1893), 1 Q. B. 200, and *Waller v. Lister* (1894), 1 Q. B. 312, cited in the notes to s. 152, *ante*. For penalty for refusing to admit, see s. 200 (11) (g), *post*, p. 542.

(e) Re-enacting 18 & 19 Vict. c. 122, s. 105.

(f) i.e. six months in the case of summary proceedings for an act which is not a continuing offence. As to continuing offences, see *L. C. C. v. Wierley*, [1894] 2 Q. B. 826.

take any proceedings or do anything authorised or required by this Act to be done by him in respect of such building or work shall begin to run from the date of his discovering that such building has been erected or work done.

194. (g) *Plans and documents to be property of Council.*—Applications plans and other documents delivered at the office of the Council or to the district surveyor in pursuance of this Act or of any byelaw of the Council thereunder shall on delivery there become the property of the Council.

195. (h) *Mode of giving approval of Council to plans.*—The approval by the Council of any plans or particulars for the purposes of this Act shall be signified in writing under the hand of the superintending architect. (i)

196. (k) *Consent how given on behalf of owners not to be found.*—Where any consent is required to be given any notice to be served or any other thing to be done by or on or to any owner in pursuance of this Act if there is no owner or if any such owner cannot be found the judge of the county court may give such consent or do or cause to be done such thing on such terms and conditions as he may think fit and may dispense with the service of any notice which would otherwise be required to be served.

[197. *Storing of wood and timber prohibited.*]

[198. *Removal of roof not to affect proceedings.*]

[199. Preventing obstruction of streets.]

200. *Offences against Act.*—Subject to the provisions of this Act every person who does any of the things specified in this section shall be deemed to have committed an offence against this Act and shall be liable upon conviction in a summary manner (7) to a penalty not exceeding the amount hereafter specified in connection with such offence and to a further penalty not exceeding the amount hereafter stated as the daily penalty in connection with such offence for every day on which the offence is continued after such conviction (that is to say):—

(1) (n) Every person who—

(a) (n) commences to form or lay out alter or adapt any street or way without having first obtained the sanction of the Council under this Act or otherwise than in accordance with the conditions (if any) prescribed by the Council in giving their sanction or by the tribunal of appeal as the case may be or commences to widen any street or way to a less extent than the prescribed distance without giving to the Council the notice prescribed by this Act; or

(b) unlawfully erects or places in upon or over any street or way any post fence (o) bar obstruction or encroachment; or

(c) unlawfully permits any such post rail fence bar obstruction or encroachment in upon or over any street or way to remain after notice served upon him by the Council to remove the same (p); or

(g) This and the two following sections are incorporated with the Amendment Act, 1905. See s. 27 (1) of that Act.

(h) Re-enacting 18 & 19 Vict. c. 122, s. 58; 53 & 54 Vict. c. cxxliii. s. 27.

(i) Where a highway authority refused to approve the plans of buildings proposed to be erected near the highway, on the ground that such buildings would interfere with the highway, although such plans were made in accordance with the byelaws, the Divisional Court refused to issue a *mandamus* compelling them to give their approval: *R. v. Hartlepool (Mayor of)* (1901), 18 T. L. R. 1.

(k) Re-enacting 18 & 19 Vict. c. 122, s. 96.

(l) See Part XV., *ante*, p. 534.

(m) Re-enacting 45 & 46 Vict. c. 14, ss. 7, 8; as to 'a continuing offence, see note (o), *infra*.

(n) See Part II., *ante*, p. 482.

(o) See s. 199. Erecting a barrier at the end of a new street is a continuing offence: *Daw v. L. C. C.*, 59 L. J. M. C. 112.

(p) See s. 199.

- (d) unlawfully alters or interferes with any street in such a manner as to impede or hinder the traffic for which such street was formed or laid out; shall be liable to a penalty not exceeding ten pounds for every offence and to a daily penalty not exceeding forty shillings;
- (2) Every person who neglects or refuses for twenty-eight days after the service of any notice empowered to be served under Part II. of this Act requiring him to set back any building or structure (g) *fence or boundary* (r) to comply with the requirements of such notice or after the expiration of such period fails to carry out or complete the works necessary for such compliance within the time (if any) limited in such notice shall be liable to a penalty of not less than forty shillings and not more than five pounds and to a daily penalty of not less than ten shillings and not more than forty shillings. Provided always that this subsection shall not apply to any non-compliance with such notice in the case of an intended highway where the same shall not be opened as a highway;
- (3) (a) Every person who—
- (a) erects or brings forward any building or structure in contravention of any of the provisions of Part III. of this Act (t) or of any conditions attached by the Council to any consent given pursuant to such provisions (u); or
 - (b) erects, alters, enlarges, rebuilds or raises or commences to erect alter enlarge rebuild or raise any building or commences so to do so as to contravene any of the provisions of Part V. of this Act (x); or
 - (c) fails to comply with any of the provisions of Part VI. of this Act; or
 - (d) (x) fails to comply with the requirements of any notice given to or served upon him under and in accordance with Part VII. of this Act within the time (if any) specified in such notice; or
 - (e) (x) sets up, erects, retains or adapts any building or structure to which Part VII. of this Act applies (y) without having obtained any approval or licence required by that Part of this Act or makes default in observing any of the conditions contained in such licence (z);
- shall be liable to a penalty not exceeding twenty pounds a day during every day of the continuance (a) of the non-compliance with the order of the Court (b) in reference to the matters aforesaid;
- (4) (c) Every person who hinders or obstructs any persons empowered by this

(i) S. 14 of the Act of 1894, which relates to the setting back of buildings, was repealed and has been replaced by a. 3 of the Act of 1898 in consequence of the decision in *L. C. C. v. Askebury Dairy Co.* (1898), 1 Q. B. 300.

(r) The words in italics were added by the London Building Act, 1898, s. 3 (2), *post*, p. 536.

(s) Re-enacting 23 & 26 Vict. c. 102, ss. 75, 76, 85; 45 & 46 Vict. c. 14, ss. 9, 12, 13; 53 & 54 Vict. c. cxxiii., ss. 33, 36.

(t) See ss. 22, 28, *ante*.

(u) Special provision is made for infringement under this sub-section by s. 7 of the Amendment Act, 1898, *post*, p. 557, which enables the Court to order the demolition of the building or structure complained of in addition to imposing a penalty. As to time at which matter of complaint arises, see *L. C. C. v. Cross*, 61 L. J. M. C. 160. See, too, *Haumann v. St. James Vestry*, L. R. 2 Q. B. 528; *Paddington Vestry v. Smeat*, 45 L. T. 475.

(w) The sections to which this sub-section relates are 40, 41, 42, 43, 47, 49. As to time for proceedings, see *L. C. C. v. Worley* (1894), 2 Q. B. 826.

(x) Special provision is made for the infringement under these two sub-sections by the Amendment Act, 1898, s. 7, which enables the Court both to inflict a fine and to order the demolition of the structure complained of. See this section *post*, p. 557.

(y) This was held to be a continuing offence, *Metropolitan Bd. of W. v. Anthony & Co.*, 61 L. J. M. C. 89; *L. C. C. v. Worley*, [1894] 2 Q. B. 826.

(z) The words in italics were inserted by the Amendment Act, 1898, s. 6, *post*, p. 547. Part VII., *ante*, provides for the erection of special and temporary buildings and works on structures.

(a) See *Metropolitan Bd. of W. v. Anthony*, 54 L. J. M. C. 89, *supra*; *L. C. C. v. Worley*, (1894) 2 Q. B. 826, *supra*; *Re White v. Schmidt*, 8 Q. B. D. 609.

(b) An order made under s. 7 of the Amendment Act, 1898, in relation to offences under s.s. 3 (a), (d), (e), *supra*, is to be deemed an order of the Court under this section. See Amendment Act, 1898, s. 7, *post*, p. 557.

(c) Re-enacting 18 & 19 Vict. c. 122, s. 86.

Act to enter and remain on any premises for the purpose of executing and to execute any work authorised or directed to be done under this Act or wilfully damages or injuries any such work shall be liable for every such offence to a penalty not exceeding ten pounds :

- (5) (d) Every person who being a building owner liable under Part VIII. of this Act (e) to make good any damage which he may occasion to the adjoining owners' or adjoining occupiers' property by any works authorised to be executed by the building owner or to do any other thing upon condition of doing which his right to execute such works is by Part VIII. of this Act (e) declared to arise fails within a reasonable time to make good such damage or to do such thing shall be liable to a penalty not exceeding twenty pounds and to a daily penalty not exceeding the like amount :
- (6) (f) Every person who refuses to admit the purchaser of any materials sold under this Act (g) his servants or agents upon the land on which the same are at a reasonable hour or impedes him or them in removing the same therefrom at a reasonable hour shall be liable to a penalty not exceeding ten pounds and to a daily penalty of [sic] not exceeding five pounds :
- (10) (h) Every person not complying with any term or condition imposed by the Council under the section the marginal note of which is "Power for Council to annex conditions" shall be liable to a penalty not exceeding ten pounds :
- (11) (a) [*As to skysigns.*]
- (11) (b) (i) Being a person who ought to serve a building notice fails to do so or begins to execute a work respecting which he ought to serve a building notice (k) before serving such notice or having served a building notice begins to execute the work to which it relates before the expiration of two clear days after the notice has ceased to operate ; or
- (c) (l) Refuses to permit any district surveyor at a reasonable time to enter (m) survey or inspect any building work or premises which such surveyor is by this Act authorised to enter and inspect or refuses or neglects to afford him all reasonable assistance in such inspection ; or
- (d) (l) Fails to comply with any order of the county court (n) made in pursuance of this Act within the time named in such order ; or
- (e) Refuses to admit at a reasonable time a builder (o) to a building or otherwise prevents a builder from complying with any order of the county court made in pursuance of this Act ; or
- (f) (p) (Being a workman labourer servant or other person employed in or about any building) wilfully and without the privity or consent of the person causing the work to be done does anything in or about such building contrary to the provisions of this Act ; or
- (g) (q) Refuses to admit at a reasonable time any owner builder or person or his servants workmen or agents into any land building or structure for the purpose of complying with any notice or order served or made on him in pursuance of this Act in respect of such land building or structure

(d) Re-enacting 18 & 19 Vict. c. 122, s. 94. This penalty is cumulative, and does not take away the common law rights, *Williams v. Golding*, L. R. 1 C. P. 69, 77.

(e) See ss. 87-101, which deal with the rights of building and adjoining owners.

(f) Re-enacting 41 & 42 Vict. c. 32, s. 19.

(g) See, for instance, s. 110, which makes provision for the sale of dangerous structures.

(h) Re-enacting 25 & 26 Vict. c. 102, s. 76 ; 45 & 46 Vict. c. 14 s. 9. The section referred to is s. 190.

(i) Re-enacting 18 & 19 Vict. c. 122, ss. 41, 42, 43.

(k) See s. 145, *ante*.

(l) Re-enacting 18 & 19 Vict. c. 122, ss. 41, 42, 43.

(m) As to these powers of entry, see s. 148 (1).

(n) An appeal lies to the County Court judge in arbitration proceedings under s. 91 (1) between adjoining owners. See also ss. 94, 168.

(o) See definition, s. 5 (33).

(p) Re-enacting 18 & 19 Vict. c. 122, s. 48.

(q) Re-enacting 41 & 42 Vict. c. 32, s. 19.

or refuse or neglect to afford them all reasonable assistance in complying with such notice or executing such order; or

(h) Acts in any manner in contravention of any of the provisions of this Act relating to the storing of wood and timber &c.; or

(i) Does any other thing prohibited by this Act or fails to neglects or omits to do any other thing which he is required to do under or in pursuance of this Act;

shall be liable to a penalty not exceeding forty shillings and to a daily penalty not exceeding the like amount:

(12) Every person who without the consent of the Council converts or uses a building contrary to any of the provisions of the section of this Act of which the marginal note is "Rules as to conversion of buildings" (s) shall be liable to a penalty not exceeding ten pounds and to a daily penalty not exceeding the like amount for every day on which the building remains so converted or is used contrary to the provisions of the said section.

The liability to these penalties shall be without prejudice to any other proceedings whether under this Act or any byelaw under this Act or otherwise but so that no person shall be punished twice for the same offence. (f)

Application of Act.

201. (u) Buildings exempt from Parts of Act.]—The following buildings and works shall be exempt from the operation of Parts VI. and VII. of this Act:—

(10) (w) Buildings not exceeding in area (x) thirty square feet and not exceeding in height five feet in any part measured from the level of the ground to the under side of the eaves or roof plate and distant at least five feet from any other building and from any street and not having therein any stove flue fireplace hot air pipe hot water pipe or other apparatus for warming or ventilating the same provided that no portion of the building extends beyond the general line of buildings in any street:

(11) All buildings and structures (not exceeding in height thirty feet as measured from the footings of the walls and not exceeding in extent 125,000 cubic feet and not being public buildings) wholly in one occupation and distant at the least eight feet from the nearest street or way and at the least thirty feet from the nearest buildings and from the land of any adjoining owner. A detached dwelling-house shall not be excluded from this exemption solely by reason of its being within thirty feet of another detached building constructed as stables or offices to be used in connection with such dwelling-house:

(12) All buildings not exceeding in extent 250,000 cubic feet and not being public buildings and distant at the least thirty feet from the nearest street or way and at the least sixty feet from the nearest buildings and from the land of an adjoining owner. A detached dwelling-house shall not be excluded from this exemption solely by reason of its being within sixty feet of another detached building constructed as stables or offices to be used in connection with such dwelling-house:

(13) All party fence walls not exceeding in height seven feet measured from the top of the footings of the walls:

(c) See s. 197.

(d) The section referred to is s. 211.

(e) See s. 216.

(u) The sub-sections of this section which are omitted from the text enumerate certain special buildings, *eg.* the Old Bailey Sessions House, etc., the exclusion of which from the operation of the Act is not of general interest.

(w) Ss. 1-9 are omitted as not being of general importance. The effect of this and the following sub-sections is to exempt from Part VI. (relating to the construction of buildings) and Part VII. (relating to special and temporary buildings and wooden structures) certain small buildings (such as bicycle sheds, etc.) and certain detached houses which fulfil the description contained in the section.

(x) For measurement of area, see s. 5 (22).

- (14) Greenhouses if not attached to other buildings : (y)
- (15) Greenhouses if attached to other buildings so far as regards the necessary woodwork of the sashes doors and frames :
- (16) Cases of metal and glass used solely for holding plants fastened to the woodwork of the sill and lower sash of a window provided that no portion project over the public way or more than twelve inches beyond the external face of the wall of the building :
- (17) Openings made into walls or flues for the purpose of inserting therein ventilating valves of a superficial extent not greater than forty square inches if such valves are not nearer than twelve inches to any timber or other combustible material.

If any addition be made to any building or structure specified in subsections (10) (11) or (12) whereby any increase is caused in the area height or extent of any such building or structure beyond the area height or extent mentioned in the subsection in which any such building or structure is specified the Council may give notice to the owner or occupier of such building or structure either to remove such addition or to make the building so increased in height or extent conform with all or any of the provisions of this Act and with any byelaws under this Act relating to the construction of buildings and upon his failing to do so within fourteen days from the service upon him of such notice the Council may remove such addition to the building or structure and may recover the expenses of such removal from the owner or occupier so making default in a summary manner.

[205. Saving existing rights of gas companies.]

206. (z) Duration of exemption.—Any building structure or work in any respect exempt from the operation of this Act or in any manner privileged in respect of any provision of this Act shall remain so exempt or privileged so long only as it is used for the purpose or retains the character by reason whereof it is so exempt or privileged.

207. Buildings not to be altered so as not to conform to Act.—It shall not be lawful (unless with the consent of the Council) to make any alteration of any building in such manner that when so altered it will by reason of such alteration not be in conformity with the provisions of this Act applicable to new buildings. (a)

208. (b) When remainder of party wall, etc., to be taken down.—Unless in any case the Council otherwise allow where a party wall or external wall not in conformity with this Act has been taken down burnt or destroyed to the extent of one half thereof (measured in superficial feet) every remaining portion of the old wall not in conformity with this Act shall either be made to conform therewith or be taken down before the rebuilding thereof.

209. (c) Additions to and alterations of buildings.—Every addition to or alteration of a building and any other work made or done for any purpose in to or upon a building (except that of necessary repair not affecting the construction of any external or party wall) shall so far as regards such addition or alteration or other work be subject to the provisions of this Act and of byelaws thereunder relating to new buildings. (d)

(y) A greenhouse has been held to be a building within the meaning of the Prescription Act, 1833, *Clifford v. Holt* (1899), 1 Ch. 698.

(z) This section is incorporated with the Amendment Act, 1905. See s. 27 (1) of that Act.

(a) New buildings are defined by s. 5 (6). It may be stated generally that the Act applies only to new buildings ; but it also applies to a building taken down for more than one-half of its cubical extent and re-erected.

(b) Re-enacting 18 & 19 Vict. c. 122, ss. 10, 11.

(c) *Ib.*, s. 9. For decisions on old section, see *North Kent Ry. Co. v. Badger*, 8 E. & B. 728 ; and see *Scott v. Legg*, 10 Q. B. D. 236. As to "necessary repair," see *Badger v. Denn*, 22 J. P. 129.

(d) The alterations and additions referred to in this section will include the rebuilding of chimney stacks and the repair of party walls. Byelaws may be made by the Council under s. 164 (1). See also *Tanner v. Drew and Cadman, Builder*, Feb. 12, 1898, p. 164.

210. Application of Act to buildings erected before commencement of Act.]—A building structure or work erected or constructed before the commencement of this Act to which no objection could have been taken under any law then in force shall not be subject to the provisions of this Act as to new buildings or the alteration of buildings, but deemed to be erected or constructed in compliance with the provision of this Act.

211. Rules as to conversion of buildings.]—Unless in any case the Council otherwise allow no person shall—

- (1) convert into or use as a dwelling house any building or part of a building not originally constructed for human habitation;
 - (2) convert into one dwelling-house two or more dwelling-houses constructed originally as separate dwelling-houses;
 - (3) convert into or use as two or more dwelling-houses any building constructed originally as one dwelling-house;
 - (4) convert a building which when originally erected was legally exempt from the operation of any building enactments or bylaws in force within London into a building which had not been originally erected in its converted form and would have been within the operation of those enactments or bylaws;
 - (5) reconvert into or use as a dwelling house any building which has been discontinued as or appropriated for any purpose other than a dwelling-house;
 - (6) convert into or use as a dwelling room or part of a dwelling-room any room or part of a room used as a shop; or
 - (7) convert a dwelling-house or any part of a dwelling-house into a shop;
- in such manner that the building or part of a building so converted as aforesaid when converted will not be in conformity with the provisions of this Act relating to the class of buildings to which the building when so converted will belong. (e)

212. Buildings in progress.]—Notwithstanding anything contained in this Act a building structure or work which has been commenced before and is in progress at the commencement of this Act (f) or which is to be carried out under any contract (g) entered into before the passing of this Act (h) may be completed subject to and in accordance with the provisions of the Acts relating thereto as in force immediately previous to the passing of this Act.

213. Saving powers of local authorities.] Nothing in this Act shall take away or interfere with the powers of the local authorities with respect to the paving of new streets under the Metropolitan Management Acts. (i)

Repeal.

[**214. Repeal of section 50 of Metropolitan Railway Act 1866.]**

215. Repeal of enactments in schedule.]—(1) The Acts mentioned in the Fourth Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule.

(2) The repeal shall not affect—

(a) For penalties, see s. 206 (2). Alterations made in contravention of this section would contravene the rules and regulations of Part VI.

(f) The Act commenced on January 1, 1895.

(g) The question whether buildings erected at or about the time of the passing of the Act are affected by the Act is still material, having regard to the fact that the primary object of the Act was to affect new building. It may be taken generally, however, that where this Act is not applicable, the provisions of the old Metropolitan Building Acts are still in force: see s. 218. It was decided in *Turner v. Robinson* (1896, 1 Q. B. 66), that a building agreement entered before the passing of the Act, for the erection of a piece of land of a number of houses which were to be completed within specified times was a contract within the meaning of this Act.

(h) The Act was passed on August 1, 1894.

(i) See the Acts, *supra*, p. 74, *et seq.*

- (a) The past operation of any enactment hereby repealed nor anything duly done or suffered under any enactment hereby repealed; or
- (b) Any right privilege obligation or liability acquired accrued or incurred under or in accordance with any enactment hereby repealed; or
- (c) Any penalty forfeiture or punishment incurred in respect of any offence committed against any enactment hereby repealed; or
- (d) Any power investigation legal proceedings or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid and any such power investigation legal proceeding and remedy may be exercised and carried on as if this Act had not passed; or
- (e) Any of the powers privileges exemptions jurisdictions or authorities given to or vested in the Commissioners of Sewers by or under any Act of Parliament and existing immediately before the passing of this Act. (k)

216. (*l*) *Byelaws, etc., under repealed Acts to remain in force.*—All byelaws regulations orders consents conditions and notices duly made given imposed or issued under any Act hereby repealed shall so far as applicable for the purposes of this Act be of the same validity and effect as if they had been made given imposed or issued under this Act. And all such byelaws and regulations shall remain in force until the same shall be revoked altered or varied by byelaws duly made under the provisions of this Act. (*m*)

217. *Saving for existing officers.*—Officers appointed under any enactment hereby repealed shall continue in office in like manner as if this Act had not been passed.

[218. References in Acts or documents to repealed Acts to be read as referring to this Act.]

SCHEDULES.

THE FIRST SCHEDULE. (*n*)

PRELIMINARY.

PARTS I. and II. of this Schedule apply to walls built of bricks not of less than eight and a half inches long or of stone or other blocks of hard and incombustible substance the beds or courses being horizontal.

1. *Structure of buildings.*—Every building (*o*) unless otherwise sanctioned in accordance with this Act (*p*) shall be enclosed with walls constructed of brick stone or other hard and incombustible substances and the footings shall rest on the solid ground or upon concrete or upon other solid substructure. Provided that open sheds not exceeding sixteen feet in height and not exceeding four squares in area may be constructed of any substances and in any manner approved by the district surveyor.

2. *Construction of walls of brick, stone, etc.*—Every wall constructed of brick stone or other similar substances shall be properly bonded and solidly put together with mortar or cement and no part of such wall shall overhang any part underneath it except to the extent of six inches and provided that the projection be well and solidly corbelled out and that the side of the wall opposite to the corbelling be

(k) See on this section, *R. v. Cluer* (1898), 67 L. J. Q. B. 36.

(l) See the current Byelaws and Regulations, *post*, p. 641, *et seq.*

(m) The penalties imposed by s. 200 of this Act are without prejudice to penalties which may become due and payable under byelaws, see s. 200.

(n) This re-enacts, with modifications, Schedule 1 to the Building Act, 1855.

(o) See note to s. 5, *ante*.

(p) See ss. 82, 73.

carried up vertically in continuation of the inner face thereof. And all return walls shall be properly bonded together.

3. *Extra thickness of certain walls.*—The thickness of every wall not being built of bricks or stone or other hard and incombustible substances laid in horizontal beds or courses shall be one third greater than the thickness prescribed in Parts I. and II. of this Schedule.

4. *Thickness of walls built of materials other than such bricks, etc., as aforesaid.*—The thickness of any wall of a dwelling house (q) if built of materials other than those before specified shall be deemed to be sufficient if made of the thickness required by Parts I. and II. of this Schedule or of such thickness as may be approved by the Council.

5. *Hollow walls.*—When hollow walls are constructed there shall be a wall on one side of the hollow space of the full thickness prescribed by this Act.

6. *Height of storey.*—The heights of storeys shall be measured as follows:—

- (a) The height of a topmost storey shall be measured from the level of the underside of its floor joists up to the level of the under surface of the tie of the roof or other covering or if there is no tie then up to the level of half the vertical height of the rafters or other support of the roof;
- (b) The height of every storey other than a topmost storey shall be measured from the level of the underside of the floor joists of the storey up to the level of the underside of the floor joists of the storey next above it.

7. *Height of external and party walls.*—For the purpose of determining the thickness of a wall the height of such wall shall be measured from the base of the wall to the top of the topmost storey whether such wall is carried to the full height or not or in case of a gable when there are no storeys in the roof to half the height of the gable.

8. *Length of walls.*—Walls are deemed to be divided into distinct lengths by return walls and the length of every wall is measured from the centre of one return wall to the centre of another provided that such return walls are external party or cross walls (r) of the thickness required under this Schedule and bonded into the wall so deemed to be divided.

9. *Footings of walls.*—Unless with the consent of the Council every wall other than a wall carried on a breasted summer shall have footings:—

The projection of the bottom of the footing of every wall on each side of the wall shall be at least equal to one half of the thickness of the wall at its base unless an adjoining wall interferes in which case the projection may be omitted where that wall adjoins and the diminution of the footing of every wall shall be formed in regular offset and the height from the bottom of such footing to the base of the wall shall be at the least equal to two thirds of the thickness of the wall at its base.

10. *Underpinning.*—The underpinning (s) of walls and chimneys shall be built with brick or stone bedded in cement to the full thickness of the old wall or work and with proper footing or to an additional thickness if the increased height of the wall so requires and shall rest on the old ground or on concrete or on other solid substructure as a foundation and the whole shall be executed to the satisfaction of the district surveyor.

11. *Thickening walls.*—A wall shall not be thickened except after notice served on the district surveyor of the intention to thicken and the thickening shall be executed with brick or stone work in cement properly bonded to the old work to the satisfaction of the district surveyor.

(q) Defined, s. 5 (22).

(r) See definition, s. 5 (15) (16) (17).

(s) As to underpinning, see ss. 89 (6), 93.

PART I.

BUILDINGS NOT PUBLIC AND NOT OF THE WAREHOUSE CLASS.

External and party walls shall be of not less thickness than the thickness herein-after specified in each case viz. :—

1. When the wall does not exceed twenty-five feet in height its thickness shall be as follows :—

If the wall does not exceed thirty feet in length and does not comprise more than two storeys it shall be eight and a half inches thick for its whole height ;

If the wall exceeds thirty feet in length or comprises more than two storeys it shall be thirteen inches thick below the topmost storey (t) and eight and a half inches thick for the rest of its height.

2. Where the wall exceeds twenty-five feet but does not exceed forty feet in height its thickness shall be as follows :—

If the wall does not exceed thirty-five feet in length it shall be thirteen inches thick below the topmost storey and eight and a half inches thick for the rest of its height ;

If the wall exceeds thirty-five feet in length it shall be seventeen and a half inches thick for the height of one storey then thirteen inches thick for the rest of its height below the topmost storey, and eight and a half inches thick for the rest of its height.

3. When the wall exceeds forty feet but does not exceed fifty feet in height its thickness shall be as follows :—

If the wall does not exceed thirty feet in length it shall be seventeen and a half inches thick for the height of one storey then thirteen inches thick for the rest of its height below the topmost storey and eight and a half inches thick for the rest of its height ;

If the wall exceeds thirty feet but does not exceed forty-five feet in length it shall be seventeen and a half inches thick for the height of two storeys then thirteen inches thick for the rest of its height ;

If the wall exceeds forty-five feet in length it shall be twenty-one inches and a half thick for the height of one storey then seventeen and a half inches thick for the height of the next storey and then thirteen inches thick for the rest of its height.

4. Where the wall exceeds fifty feet but does not exceed sixty feet in height its thickness shall be as follows :—

If the wall does not exceed forty-five feet in length it shall be seventeen and a half inches thick for the height of two storeys and thirteen inches thick for the rest of its height ;

If the wall exceeds forty-five feet in length it shall be twenty-one inches and a half thick for the height of one storey then seventeen and a half inches thick for the height of the next two storeys and then thirteen inches thick for the rest of the height.

5. Where the wall exceeds sixty feet but does not exceed seventy feet in height its thickness shall be as follows :—

If the wall does not exceed forty-five feet in length it shall be twenty-one inches and a half thick for the height of one storey then seventeen and a half inches thick for the height of the next two storeys and then thirteen inches thick for the rest of its height ;

If the wall exceeds forty-five feet in length it shall be increased in thickness in

^r (t) Under the old Act it was held that "topmost storey" need not necessarily be contained within four vertical walls ; doors or rooms enclosed on three sides by vertical walls and in front by the sloping roof of a house, are storeys within the meaning of this rule, *Foot v. Hodgson*, 25 Q. B. D. 160, and see now s. 5 (14), *ante*.

each of the storeys below the uppermost two storeys by four inches and a half (subject to the provision in this Schedule respecting distribution of piers).

6. Where the wall exceeds seventy feet but does not exceed eighty feet in height its thickness shall be as follows:—

If the wall does not exceed forty-five feet in length it shall be twenty-one inches and a half thick for the height of one storey then seventeen and a half inches thick for the height of the next three storeys and thirteen inches thick for the rest of its height;

If the wall exceeds forty-five feet in length it shall be increased in thickness in each of the storeys below the uppermost two storeys by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

7. Where the wall exceeds eighty feet but does not exceed ninety feet in height its thickness shall be as follows:—

If the wall does not exceed forty-five feet in length it shall be twenty-six inches thick for the height of one storey then twenty-one inches and a half thick for the height of the next storey then seventeen and a half inches thick for the height of the next three storeys and then thirteen inches thick for the rest of its height;

If the wall exceeds forty-five feet in length it shall be increased in thickness in each of the storeys below the uppermost two storeys by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

8. Where the wall exceeds ninety feet but does not exceed one hundred feet in height its thickness shall be as follows:—

If the wall does not exceed forty-five feet in length it shall be twenty-six inches thick for the height of one storey then twenty-one inches and a half thick for the height of the next two storeys then seventeen and a half inches thick for the height of the next three storeys and then thirteen inches thick for the rest of its height;

If the wall exceeds forty-five feet in length it shall be increased in thickness in each of the storeys below the uppermost two storeys by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

9. Where the wall exceeds one hundred feet but does not exceed one hundred and twenty feet in height its thickness shall be as follows:—

If the wall does not exceed forty-five feet in length it shall be thirty inches thick for the height of one storey then twenty-six inches thick for the height of the next two storeys then twenty-one inches and a half thick for the height of the next two storeys then seventeen and a half inches thick for the height of the next three storeys and then thirteen inches thick for the rest of its height;

If the wall exceeds forty-five feet in length it shall be increased in thickness in each of the storeys below the uppermost two storeys by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

10. *Condition in respect of storeys exceeding certain height.*—If any storey exceeds in height sixteen times the thickness prescribed under this Schedule for the walls of such storey the thickness of each external and party wall throughout such storey shall be increased to one sixteenth part of the height of the storey and the thickness of each external and party wall below that storey shall be increased to a like extent but any such additional thickness may be confined to piers properly distributed of which the collective width amount to one fourth part of the length of the wall.

11. *Restriction in case of certain storeys.*—No storey enclosed with walls less than thirteen inches in thickness shall be more than ten feet in height between the floor and the ceiling thereof or between the floor and the tie of the roof.

12. *Rule as to buildings not being public buildings or buildings of the warehouse class.*—All buildings excepting public buildings and such buildings as are in this Act defined to be buildings of the warehouse class shall as respects the thickness of their walls be subject to the provisions contained in this part of this Schedule.

PART II.

BUILDINGS OF THE WAREHOUSE CLASS. (u)

Thickness at base.—The external and party walls of buildings of the warehouse class shall at the base (w) be made of not less thickness than the thickness hereinafter specified in each case viz. :—

1. Where the wall does not exceed twenty-five feet in height (whatever is its length) it shall be thirteen inches thick at its base.

2. Where the wall exceeds twenty-five feet but does not exceed thirty feet in height it shall be at its base of the thickness following :—

If the wall does not exceed forty-five feet in length it shall be thirteen inches thick at its base ;

If the wall exceeds forty-five feet in length it shall be seventeen and a half inches thick at its base.

3. Where the wall exceeds thirty feet but does not exceed forty feet in height it shall be at its base of the thickness following :—

If the wall does not exceed thirty-five feet in length it shall be thirteen inches thick at its base ;

If the wall exceeds thirty-five feet but does not exceed forty-five feet in length it shall be seventeen and a half inches thick at its base ;

If the wall exceeds forty-five feet in length it shall be twenty-one inches and a half thick at its base.

4. Where the wall exceeds forty feet but does not exceed fifty feet in height it shall be at its base of the thickness following :—

If the wall does not exceed thirty feet in length it shall be seventeen and a half inches thick at its base ;

If the wall exceeds thirty feet but does not exceed forty-five feet in length it shall be twenty-one inches and a half thick at its base ;

If the wall exceeds forty-five feet in length it shall be twenty-six inches thick at its base.

5. Where the wall exceeds fifty feet but does not exceed sixty feet in height it shall be at its base of the thickness following :—

If the wall does not exceed forty-five feet in length it shall be twenty-one inches and a half thick at its base ;

If the wall exceeds forty-five feet in length it shall be twenty-six inches thick at its base.

6. Where the wall exceeds sixty feet but does not exceed seventy feet in height it shall be at its base of the thickness following :—

If the wall does not exceed forty-five feet in length it shall be twenty-one inches and a half thick at its base ;

If the wall exceeds forty-five feet in length it shall be increased in thickness from the base up to within sixteen feet from the top of the wall by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

(u) See definition, s. 5 (28).

(w) See definition, s. 5 (10).

7. Where the wall exceeds seventy feet but does not exceed eighty feet in height it shall be at its base of the thickness following :—

If the wall does not exceed forty-five feet in length it shall be twenty-one inches and a half thick at its base ;

If the wall exceeds forty-five feet in length it shall be increased in thickness from the base up to within sixteen feet from the top of the wall by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

8. Where the wall exceeds eighty feet but does not exceed ninety feet in height it shall be at its base of the thickness following :—

If the wall does not exceed forty-five feet in length it shall be twenty-six inches thick at its base ;

If the wall exceeds forty-five feet in length it shall be increased in thickness from the base up to within sixteen feet from the top of the wall by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

9. Where the wall exceeds ninety feet but does not exceed one hundred feet in height it shall be at its base of the thickness following :—

If the wall does not exceed forty-five feet in length it shall be twenty-six inches thick at its base ;

If the wall exceeds forty-five feet in length it shall be increased in thickness from the base up to within sixteen feet from the top of the wall by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

10. Where the wall exceeds one hundred feet but does not exceed one hundred and twenty feet in height it shall be at its base of the thickness following :—

If the wall does not exceed forty-five feet in length it shall be thirty-one inches thick at its base ;

If the wall exceeds forty-five feet in length it shall be increased in thickness from the base up to within sixteen feet from the top of the wall by four inches and a half (subject to the provision in this Schedule respecting distribution in piers).

11. The thickness of the wall at the top and for sixteen feet below the top shall be thirteen inches and a half and the intermediate parts of the wall between the base and sixteen feet below the top shall not be of less thickness than would be the case if the wall were to be built solid throughout the space between straight lines drawn on each side of the wall and joining the thickness at the base to the thickness at sixteen feet below the top :

Nevertheless in walls not exceeding thirty feet in height the walls of the topmost storey may be nine inches thick provided the height of that storey does not exceed ten feet.

12. *Condition in respect of storeys exceeding a certain height.*—If in any storey of a building of the warehouse class the thickness of the wall as determined by the provisions of this Schedule is less than one fourteenth part of the height of such storey the thickness of the wall shall be increased to one fourteenth part of the height of the storey and the thickness of each external and party wall below that storey shall be increased to a like extent but any such additional thickness may be confined to piers properly distributed of which the collective widths amount to one fourth part of the length of the wall.

13. *Thickness of walls built of materials other than such bricks, etc., as aforesaid.*—The thickness of any wall of a building of the warehouse class if built of materials other than those before specified shall be deemed to be sufficient if made of the thickness required by the provisions of this Schedule or of such other thickness as may be approved by the Council.

[MISCELLANEOUS.

1. *Cross-walls.*—The thickness of a cross-wall (*x*) shall be two-thirds of the thickness hereinbefore required for an external or party wall of the same dimensions and belonging to the same class of buildings but never less than eight and a half inches and no wall subdividing any building shall be deemed to be a cross-wall unless it is carried up to the floor of the topmost storey and unless in each storey the aggregate extent of the vertical faces or elevations of all the recesses and that of all the openings therein taken together does not exceed one-half of the whole extent of the vertical face or elevation of the wall.

2. Wherever a cross-wall becomes in any part an external wall such cross-wall shall be of the thickness required for an external wall of the same height and length and belonging to the same class of buildings.

3. Where an increase of thickness is by any rule of Part I. or Part II. of this Schedule required in case of a wall exceeding sixty feet in height and forty-five feet in length or in case of a storey exceeding in height sixteen times or fourteen times (as the case may be) the thickness prescribed for its walls or in case of a wall below such storey the increased thickness may be confined to piers properly distributed of which the collective widths amount to one-fourth part of the length of the wall.

THE SECOND SCHEDULE. (*y*)

THE THIRD SCHEDULE.

FEES PAYABLE TO DISTRICT SURVEYORS. (*z*)

PART I.

ON NEW BUILDINGS.

For any building not exceeding thirty square feet in area and not exceeding ten feet in height (<i>a</i>)	£	s.	d.
	0	10	0
For every building not exceeding four hundred square feet in area and not more than two storeys in height	1	10	0
For every additional storey	0	5	0
For every additional square or fraction of a square	0	2	6
For every building not exceeding four hundred square feet in area and of one storey only in height	0	15	0

ON ADDITIONS ALTERATIONS OR OTHER WORKS.

For every addition or alteration or other work to which the provisions of this Act apply made or done to or on any building after the roof thereof has been covered in

one half of the fee charged in the case of a new building calculated upon the area of the whole building.

For inspecting the arches or fire-resisting floors over or under public ways (*b*)

0 10 0

(*x*) See definition, s. 5 (17).

(*y*) This schedule is repealed by the Amendment Act, 1905, and replaced by Sched. III. of that Act. See *post*. For a case as to incombustible materials, see *Payne v. Wright*, [1892] 1 Q. B. 104.

(*z*) See s. 154, by which fees payable to district surveyors under Parts I. and III. may be reduced.

Certain additional fees are payable to district surveyors under the Amendment Act, 1905, for inspections, etc., made by them in accordance with the provisions of that Act. See s. 18 (3), and Sched. II of that Act.

(*a*) Such a building may, however, be exempt. See s. 201 (10).

(*b*) See ss. 71, 72.

For inspecting the formation of openings in party walls (for each opening) (c)	£	s.	d.
For inspecting the closing of openings in party walls (for each opening) (d)	0	10	0

Provided that in the case of public buildings, buildings constructed of concrete and buildings divided into separate sets of chambers or tenements by party structures the fees hereinbefore specified in this part of this Schedule shall in every case be increased by one-half. (e)

ON CHIMNEYS AND FLUES. (f)

On the construction of a furnace chimney-shaft or similar shaft for ventilation or other purposes in addition to the fee for any other operation in progress at the same time if not exceeding twenty-five feet in height	2	0	0
If exceeding twenty-five feet and not exceeding one hundred feet in height	2	10	0
For every additional ten feet or portion of ten feet in height	0	10	0
On the carrying of a flue from an oven stove steam-boiler furnace or close-fire into an old flue	0	10	0
On certifying that a chimney breast in a party wall may be cut away	0	10	0

ON CERTIFYING PLANS.

For examining and certifying plan of an old building (g)	2	2	0
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ON WOODEN AND TEMPORARY STRUCTURES.

On inspection of any wooden structure or on inspection of any structure or erection put up on any public occasion the same amount as for a new building calculated on the area of the structure or erection without reference to the area of any building to which it may be attached or in or on which it may be put up. (h)

ATTENDING AT COURT.

For attending at a court when an order is made for complying with notice of irregularity	0	10	0
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PART II.

ON DANGEROUS STRUCTURES.

On each dangerous structure (i)—

Where there are not more than four adjoining or nearly contiguous structures in the same ownership—

(a) See s. 77 (1).

(d) See s. 77 (4).

(e) This proviso is new, and is inserted in consequence of the case of *Muir v. Williams*, [1902] 1 Q. B. 261. And see notes to s. 5 (2), *ante*.

(f) See ss. 61-67.

(g) See ss. 13 (5), 43.

(h) See s. 84.

(i) See ss. 102-114. A party wall is *one* dangerous structure, although proceedings in respect of it may have been instituted against both the adjoining owners. See *L. C. C. v. Sherman* (1904), 69 J. P. 300, cited in the notes to s. 113, *ante*, p. 26.

	£	s.	d.
1. For making a survey of the structure reported as dangerous and certifying opinion thereon—			
If the structure do not exceed four squares in area and two storeys in height	0	7	6
If exceeding four squares	0	10	0
For every additional storey above two	0	2	6
2. For each inspection of the structure and report as to completion or progress of the works	0	5	0
3. For inspecting the structure before the hearing of the summons and attending the court to give evidence—			
If one structure only	0	10	0
If more than one structure (for each structure)	0	5	0
4. For inspecting the structure before the hearing of the summons against the occupier (the owner having failed to comply) and attending the court to give evidence—			
If one structure only	0	10	0
If more than one structure (for each structure)	0	5	0
5. For every adjournment of the summons	0	5	0
6. For superintending the erection of shoring (including needling when requisite) and hoarding whether done by the Council or not and for certifying the account for the same when done by the Council	0	10	0
7. For shoring without hoarding or hoarding without shoring and certifying the account	0	7	6
8. For supervision including the report of the officer in cases where it is necessary for the Council to execute works to ensure the safety of the public under an order made by a court	0	5	0

Where there are more than four adjoining or nearly contiguous structures in the same ownership—

For Nos. 2 3 and 4 in the above table	0	4	0
For No. 5	0	2	6
And for No. 8	0	4	0

PART III.

FEES PAYABLE FOR SPECIAL SERVICES.

The fees payable by a builder to the district surveyor for special services shall be the following :—

For superintending the construction of floors and partition walls to stables under section 70 of this Act per building (k)	0	5	0
For superintending the construction of overhanging oriel windows (l) per building	0	5	0
For superintending the fixing of any oven copper steam-boiler or stove to be used for trade purposes and not heated by gas (m)	0	10	0
For superintending the fixing of pipes for conveying heated air or hot water or steam at high pressure (for each floor of building on which pipes are fixed)	0	10	0
For services relating to the erection of buildings on low-lying lands per building (n)	0	5	0

(k) See s. 70 (c).

(m) See s. 66.

(l) See s. 73 (6) (e).

(n) See s. 122.

PART IV. (v)

FEES PAYABLE TO COUNCIL.

On Dangerous Structures. (p)

For general service—	£	s.	d.
1. For preparation of notices forms for same and postage	0	3	6
2. For service of notices (clerk's time)	0	2	6
3. For travelling per mile (one way)	0	0	3
4. For obtaining summonses and orders (clerk's time)	0	2	6
5. For cost of each summons or order	0	3	0

Where there are two or more adjoining or nearly contiguous structures in the same ownership—

For Nos. 2 and 4 (above) each	0	2	0
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The fees payable upon ten structures shall be the maximum fees.

On Dilapidated and Neglected Buildings or Structures. (q)

1. For each inspection of the building or structure and report	0	5	0
2. For obtaining summons and order (clerk's time)	0	2	6
3. For cost of each summons or order	0	2	0
4. For attendance at a court to give evidence	0	5	0
5. For every adjournment	0	2	6
6. For supervision of works including report of officer in cases where the magistrate's order is executed by the Council	0	5	0
7. For travelling per mile (one way)	0	0	3
8. The cost of procuring local evidence to satisfy the magistrate that the condition of the structure is prejudicial to the property or to the inhabitants of the neighbourhood is to be considered separately in each case.			

Where there are two or more adjoining or nearly contiguous structures in the same ownership—

For Nos. 1 4 or 6 (above) each	0	3	0
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For Nos. 2 or 5 (above) each	0	2	0
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The fees payable upon ten structures shall be the maximum fees.

For travelling per mile (one way)	0	0	3
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REGULATIONS.

1. The fees specified in this Schedule in respect of works to a party wall comprise the fees payable in respect of both sides of the wall.

2. No fee shall be charged in respect of the fixing of a chimney pot.

3. No fee shall be charged in respect of the repairing of a chimney top unless the top has been pulled down to a greater extent than twelve inches.

4. No fee shall be charged in respect of the repairing of a parapet unless the parapet shall have been pulled down to a greater extent than twelve inches.

5. In calculating the area of every new building for the purposes of this Schedule the area of all outbuildings not exceeding thirty feet in area whether attached or not shall be included provided such outbuildings be erected at the same time as the main building. (r)

THE FOURTH SCHEDULE.

[LIST OF REPAIRS.]

(a) This Part is new.

(p) Ss. 102-114.

(q) See ss. 115, 116.

(r) As to buildings under 30 feet square, see s. 201 (10).

THE LONDON BUILDING ACT AMENDMENT ACT, 1898.

61 & 62 VICT. c. cxxxvii.

An Act to amend the London Building Act, 1894.

[25th July, 1898.]

WHEREAS, ETC.

1. *Short title.*—This Act may be cited as the London Building Act 1894 (Amendment) Act 1898.

2. *Act of 1894 and this Act to be construed as one Act.*—The London Building Act 1894 (in this Act referred to as “the principal Act”) as amended by this Act and this Act shall be read and construed together as one Act and words and expressions used in this Act shall unless the context otherwise requires bear the meanings assigned to them in the principal Act and any references in the principal Act to any part or provisions of the principal Act shall be construed as referring to such part or provisions as amended by this Act. (a)

3. (b) *Notice to set back buildings, etc.*—(1) In every case where any new building (c) or new structure or any part thereof is erected or any building or structure or any part thereof is extended in such manner that any external wall (d) of such building or structure or (if there be a forecourt or other space between such external wall and the roadway) any part of any external fence or boundary of such forecourt or space shall be at a distance in any direction from the centre of the roadway of any street (e) or way (being a highway) less than the distance permitted under Part II. of the principal Act (f) or contrary to the conditions and terms (if any) subject to which the Council or the tribunal of appeal has sanctioned the erection or extension of such building or structure

the Council may serve a notice upon the owner or occupier of the said building structure fence or boundary or upon the builder requiring him to cause such building structure fence or boundary or any part thereof to be set back so that every part of any external wall of such building or structure or of the external fence or boundary of such forecourt or space shall be at a distance in every direction from the centre of the roadway of such street or way not less than the distance permitted under Part II. of the principal Act (f) and shall be in accordance with such conditions and terms (if any) as the Council or the tribunal of appeal may have prescribed.

(2) Any notice served under the provisions of this section shall be deemed to be a notice empowered to be served under Part II. of the principal Act within the meaning of the second subsection of the two hundredth section of the principal Act

(a) For definitions of terms and phrases, see s. 5 of the Act of 1894. It should also be observed that the Act of 1894 is amended in certain important particulars by that of 1905.

(b) This section was rendered necessary by the case of *L. C. C. v. Aylesbury Dairy Co.* (1898), 1 Q. B. 106. It supersedes s. 14 of the principal Act.

(c) See s. 5 (6) of the Act of 1894.

(d) See definition, s. 5 (15) of the Act of 1894.

(e) As to the meaning of the term “street,” see note to s. 7 of the Act of 1894.

(f) This part relates to formation and widening of streets.

which subsection shall be read and construed and take effect as though the words "fence or boundary" had been originally inserted therein immediately after the word "structure." (q)

(3) The fourteenth section of the principal Act is hereby repealed and from and after the passing of this Act the principal Act shall be read and have effect as if this section had been inserted therein instead of the said fourteenth section.

(4) Nothing in this section shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes. (h)

4. *Height of working-class dwellings in certain streets.*—The proviso in s. 13 (5) of the principal Act commencing with the words "Provided always that no dwelling-house" is hereby, so far as the said proviso relates to dwelling-houses inhabited or adapted to be inhabited by persons of the working class and situate outside the city, amended so that it shall hereafter be read and have effect as if the words "a distance of twenty feet from the centre of the roadway" were substituted for the words "the prescribed distance" wherever the words "the prescribed distance" occur in the said proviso.

5. (i) *Service of summonses and orders relating to dangerous or neglected structures.*—Section 183 of the principal Act shall not apply to any notice summons or order to be served upon the owner or occupier of a dangerous or neglected structure:

Any such notice summons or order may be served on the owner or occupier of the dangerous or neglected structure by delivering a copy thereof to some person on the premises to which such notice summons or order relates or if no person be found on the premises, then by fixing the same or a copy thereof on some conspicuous part of the premises to which it relates and in the case of a railway company by delivering a copy thereof to the secretary at the principal office of the Company and in any such notice summons or order it shall be sufficient to describe the owner or occupier as "the owner" or "the occupier" and the same may be addressed to the owner or occupier by the description of "the owner" or "the occupier" of the premises (naming the premises) to which the same relates without further name or description:

Provided always that when the owner of any dangerous or neglected structure and his residence are known to the Council it shall be the duty of the Council to send a copy of every such notice summons or order by registered post addressed to the usual or last known residence of such owner:

In this section the expression "structure" shall have the meaning assigned to it in Part IX. of the principal Act. (k) In cases where a dangerous structure is situate within the city this section shall be read as if the Corporation were named therein instead of the Council. (l)

6. *Amendment of s. 200 s.s. (3) of Act of 1894.*—Subsection (3) (c) of s. 200 of the principal Act shall hereafter be read and construed and take effect as though the word "retains" had been inserted therein immediately after the word "erects" and the words "approval or" had been inserted therein immediately before the word "licence" wherever such word occurs therein. (m)

7. *Amendment of s. 200 s.s. (3) of Act of 1894.*—Every person who does any of the things specified in paragraphs (a), (d) and (e) of s.s. (3) of s. 200 of the principal Act as amended by this Act shall be liable on conviction to a penalty not exceeding:

(i) See s. 200 (2) of the Act of 1894, and notes thereon.

(k) For other exemptions of railway companies, see s. 201 of the principal Act.

(l) This section was rendered necessary by the decision in *R. v. Mead* (1898), 1 Q. B. 110, and at p. 107, *ante*.

(m) See s. 182 of the Act of 1894.

(n) As to the general effect and amendment of Part IX. of the Act of 1894 within the City, see s. 191 of the Act of 1894.

(o) This section was inserted to meet the case of *R. v. Cress*, 77 L. T. 409. See note to s. 21 (1) of the Act of 1894, *ante*.

forty shillings for every such offence and the court before whom an information is laid by the Council in respect thereof may, in addition to imposing such penalty, make an order in writing directing such person to demolish the building or structure complained of or any part thereof, or to comply with the conditions contained in any consent licence (*n*) or approval granted by the Council for the setting up erection adaptation alteration or retention of such building or structure and such order of the court shall be deemed to be the order of the court within the meaning and for the purposes of s.s. (3) of s. 200 of the principal Act and the imposition of any penalty under the provisions of this present section shall be without prejudice to any proceedings under s.s. (3) of s. 200 of the principal Act for the daily penalty therein mentioned (*o*) or under any other provisions of the principal Act or otherwise but so that no person shall be liable to more than one penalty (other than daily penalties) for the same offence.

8. [*As to the Stock Exchange buildings.*]

9. [*Saving for gas companies.*]

10. [*Costs of Act.*]

(*n*) As to licences to bring forward any building or structure, see ss. 22 and 26 of the Act of 1894.

(*o*) See s. 200 (3) of the Act of 1894, *ad fin.*

THE LONDON BUILDING ACTS (AMENDMENT) ACT, 1905.

5 EDW. VII. c. ccix.

An Act to amend the Acts relating to buildings in London to confer various powers on the London County Council and for other purposes.

[11th August, 1905.]

WHEREAS the provisions contained in the London Building Act 1894 (hereinafter referred to as "the Act of 1894") as amended by the London Building Act 1894 (Amendment) Act 1898 (hereinafter referred to as "the Act of 1898") and the powers thereunder of the London County Council (in this Act referred to as "the Council") are insufficient to secure the provision and maintenance of proper means of escape in case of fire from buildings in the administrative county of London:

BE IT ENACTED AS FOLLOWS:—

1. *Short title.*—This Act may be cited as the London Building Acts (Amendment) Act 1905.

2. *Acts of 1894 and 1898 and this Act may be cited together.*—The Act of 1894 and the Act of 1898 and this Act may be cited together as the London Building Acts 1894 to 1905. (a)

3. *Commencement of Act.*—This Act shall except where otherwise expressly provided come into operation on and shall take effect from the first day of January next after the passing thereof (b) which date is in this Act referred to as "the commencement of this Act."

4. *Extent of Act.*—This Act shall extend to London (c) and no further.

5. *Definition of fire-resisting material.*—In the Act of 1894 the Act of 1898 and this Act unless the context otherwise requires the expression "fire-resisting material" means any of the materials and things described or referred to in the First Schedule to this Act. (d)

6. *Interpretation.*—(1) In and for the purposes of this Act unless the subject or context otherwise requires—

(i) The expression "owner" (except as used in the section of this Act the marginal note whereof is "From to district surveyors" (e)) means the person for the time being receiving the rackrent of the premises in connection with which the said expression is used whether on his own

(a) It is to be observed that the Acts 1894 and 1898 are not to be read together with this Act. Certain provisions of the Act of 1898 are, however, incorporated with this Act. See s. 29, *post*.

(b) The Act was passed in August, 1905, and commenced on January 1, 1906. Existing buildings, however, are not affected until January 1, 1907. See s. 3.

(c) "London" means the administrative county of London. Act of 1891, s. 5 (10).

(d) Fire-resisting material was formerly defined by Sched. II. of the Act of 1894. This schedule is now repealed, and a more comprehensive definition has been put into force. See Sched. I., *post*.

(e) See s. 14, *post*.

account or as agent or trustee (*g*) for any other person, or who would so receive the same if such premises were let at a rackrent; but where used in the said section the said expression shall have the same meaning as is assigned thereto by s. 5 (*h*) of the Act of 1894:

- (ii) The expression "rackrent" means rent which is not less than two thirds of the full annual value of the premises out of which the rent arises and the full annual value (*i*) shall be taken to be the annual rent which a tenant might reasonably be expected taking one year with another to pay for the premises if the tenant undertook to pay all usual tenant's rates and taxes and tithe commutation rentcharge (if any) and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the premises in a state to command such rent (*k*).
- (iii) The expression "upper storey" (*l*) means any storey the level of the upper surface of the floor whereof is at a greater height (*m*) than fifty feet above the level of the footway (if any) immediately in front of the centre of the face of the building in which such storey is situate or (where there is no such footway) above the level of the ground before excavation:
- (iv) The expression "high building" means any building any storey whereof is an upper storey as hereinbefore defined:
- (v) The expression "new building" means any building the actual erection of which above the footings shall not have been *bonâ fide* and substantially commenced at the date of the commencement of this Act (*n*) or which has been taken down burnt or destroyed for more than one half of its cubical extent (*o*) and re-erected or commenced to be re-erected after such date or of which the cubical extent has been increased after such date by an amount equal to the cubical extent of the building as existing before such increase and any existing building which by reason of any alteration thereof or addition thereto becomes a high building after such date:
- (vi) The expression "existing building" means any building not being a new building:
- (vii) The expression "certified building" means any building in respect whereof the Council shall have issued a certificate or which the tribunal of appeal shall have determined to have been provided with means of escape under the provisions of the section (*p*) of this Act of which the marginal note is "Protection against fire in certain new buildings":
- (viii) The expression "the tribunal of appeal" means the tribunal of appeal constituted by the Act of 1894 (*q*):
- (ix) The expression "plans" means plans sections and elevations.

(2) Words and expressions used in this Act shall unless other meanings are assigned to them by this Act or the context otherwise requires bear the meanings respectively assigned to them by the Act of 1894 (*r*) and any reference in the Act of 1894 or in the Act of 1898 or in this Act to any part or provisions of the

(*g*) See *Weatherall v. Thomas* (1900), 1 Ch. 319.

(*h*) See s. 5 (29) of the Act of 1894, *ante*. This definition of "owner" is practically identical with those given in the Public Health Act, 1875, s. 4 (see p. 615, *post*); the Public Health (London) Act, 1891, s. 141 (see p. 613, *post*); and the Metropolis Management Act, 1855, s. 250 (p. 589, *post*). Illustrative cases will be found in the notes to each of these sections. And see *Hackney Corporation v. Lee Conservancy Bd.* (1904), 2 K. B. 541; *Hornsey District Council v. Smith* (1897), 1 Ch. 843.

(*i*) "Full annual value" here has practically the same meaning as "rateable value," as defined by the Metropolis Valuation Act, 1869 (32 & 33 Vict. c. 67).

(*k*) This definition is identical with that which is to be found in the Public Health (London) Act, 1891, s. 141. See p. 613, *post*.

(*l*) Cf. "the expression 'topmost storey' means the uppermost storey in a building, whether constructed wholly or partly in the roof or not:" Act of 1894, s. 5 (14).

(*m*) As to the meaning of height, see s. 5 (21) of the Act of 1894.

(*n*) See s. 3, *ante*.

(*o*) See definition in s. 5 (24) of the Act of 1894.

(*p*) See s. 7 (2), *post*.

(*q*) See ss. 175, *et seq.*, of the Act of 1894.

(*r*) See s. 5 of the Act of 1894.

Act of 1894 or to any schedule or part of any schedule to the Act of 1894 shall be construed as referring to such part or provisions or schedule or part of a schedule as amended by the Act of 1898 and by this Act respectively.

7. Protection against fire in certain new buildings.]—(1) Every new building (s) (except a dwelling-house occupied as such by not more than one family (t)) which is—

(a) A high building (u); or

(b) A building in which sleeping accommodation is provided for more than twenty persons or

which is occupied (w) or constructed or adapted to be occupied by more than twenty persons or

in which more than twenty persons are employed or

which is constructed or adapted for the employment therein of more than twenty persons (x);

shall be provided in accordance with plans approved by the Council or in the event of an appeal (y) the tribunal of appeal with all such means of escape therefrom in case of fire as can be reasonably required under the circumstances of the case.

The owner (z) of the building shall before or at the same time that the building notice under s. 115 (Notices to be given to surveyor by builder of the Act of 1894 in respect of such building is served on the district surveyor or deposit or cause to be deposited at the county hall a notice stating the like matters and particulars as are required by the last-mentioned section to be stated in a building notice thereunder together with a copy (which may be a sun-print or photographic reproduction on paper) of the plans prepared for such new building showing so far as may be necessary for the purposes of this Act the means of escape proposed to be provided in connection with such building. (a)

It shall be lawful for the Council at any time within the period of one month (b) or in the event of such period of one month commencing or expiring on any day between August 1 and September 14 both inclusive then within the period of two months after the deposit as aforesaid of such plans to refuse to approve such plans or to approve the same subject to such conditions (if any) as they may prescribe

provided that the Council shall within such period as aforesaid give notice to the applicant of such refusal or conditional approval stating fully all their reasons for such refusal or for the imposition of such conditions as the case may be.

Provided that if within the period limited as aforesaid the Council fail to give notice of their refusal to approve any such plans or of the conditions subject to

(s) As defined by s. 6 (1) (v), *ante*. As to the provision of means of access to the roof, see s. 12 (1), (11.), *post*.

(t) As to the meaning of these words, see Act of 1894, s. 5 (25), and *Kyllin v. Simmons* (1901), 67 J. P. 224.

(u) As defined, *ante*, s. 6 (1) (iv). The powers of the Council with reference to such buildings are limited by ss. 4, *infra*.

(w) The expression "occupy" is defined by s. 5 (30) of the Act of 1894.

(x) The question whether a building is adapted to be occupied by or for the employment of more than twenty persons is one of fact for the magistrate to determine. The Act contains no definition of the term "employment." See *L. C. C. v. Dimes and Horton Bros.*, 77 L. T. 693, and other cases cited in the notes to s. 13 of the Act of 1894, *ante*. It is submitted that the question as to what will constitute employment will be a question of law. One thing is clear, namely, that the employment need not be continuous nor need there be any actual employment; for the section in terms extends to buildings which are merely "adapted" for the employment of more than twenty persons.

(y) See s. 22 (1) (a), *post*.

(z) As defined by s. 6 (1) (i), *supra*.

(a) Having regard to the decision in the cases (see *L. C. C. v. Lewis* (1900), 69 L. J. Q. B. 11, 277; *L. C. C. v. Bram* (1901), 17 T. L. R. 591) which were decided with reference to s. 11 (1) of the Factory and Workshop Act, 1901, it is submitted that the powers of the Council under this section are limited to the enforcing of such measures only as are necessary to provide means of escape in case of fire in a particular building, and do not extend to requiring the owner of a building to provide such means of escape as will encroach upon, and constitute a trespass on, the property of a third party.

(b) See *Indcliffe v. Forthnew* (1892), 1 Q. B. 64.

which they approve any such plans they shall be deemed to have approved such plans without conditions.

(2) No upper storey in any high building not being of the class referred to in s.s. (1) (b) of this section and no part of any building of the class referred to in the said paragraph shall be occupied or let for occupation until the Council shall have issued a certificate or (in the event of an appeal) the tribunal of appeal shall have determined that such building has been provided with means of escape in accordance with plans approved as aforesaid by the Council or the tribunal of appeal (as the case may be) and that the conditions (if any) subject to which such plans were so approved have been complied with.

Provided that unless the Council shall within fourteen days after notice of completion of any such building shall have been given to the Council by the owner notify to the owner that such certificate is refused and the grounds of such refusal such certificate shall be deemed to have been duly issued.

(3) If by reason of any structural alteration or addition of a substantial character of or to any certified building (being a building of the class referred to in s.s. (1) (b) of this section) the sleeping accommodation in such building is substantially increased, and the risk of fire in such building, or the difficulty of escaping therefrom in case of fire is thereby substantially increased or

if the number of persons occupying or employed or dwelling in the upper storeys of any certified building (being a high building but not being a building of the class referred to in the said paragraph), or in any part of any certified building (being a building of the class referred to in the said paragraph), is substantially increased, and the risk of fire in the upper storeys of such building (being a high building), or in any part of such building (being a building of the class referred to in the said paragraph), or the difficulty of escaping from any such upper storey, or part of a building (as the case may be) in case of fire is thereby substantially increased, or

if by reason of any change of circumstances, in or affecting any certified building the risk of fire in such building is substantially increased, or escape from such building, or any such upper storey as aforesaid (as the case may be) in case of fire is rendered substantially more difficult, or if by reason of any material change in the mode of user of any certified building the risk of fire in such building is substantially increased, or escape from such building or from any such upper storey as aforesaid (as the case may be) in case of fire is rendered substantially more difficult,

then and in any of such events the certificate issued by the Council or the determination of the tribunal of appeal (as the case may be) in respect of such building shall thenceforth be void and of none effect and such building shall thenceforth cease to be a new building and be deemed to be an existing building: (c)

Provided that the notice to be served on the owner of such building by the Council under the provisions of this Act whereof the marginal note is "Protection against fire in certain existing buildings" (d) shall if the owner request the Council in writing so to do (giving particulars of any proposed or completed alteration, addition or change or circumstances) be served within two months after the receipt by them of such written request and that if notwithstanding such written request no such notice is so served within the period aforesaid such building or the upper storeys of such building as the case may be shall be deemed to be in the opinion of the Council provided with proper and sufficient means of escape in case of fire.

(4) Nothing in this section contained shall authorise the Council to require in the case of a building being a high building and not being a building of the class referred to in paragraph (b) of subsection (1) of this section any means of escape from any storey other than an upper storey. (e)

8. *As to occupation of certain buildings during rebuilding.*—Nothing in s. 7 (2) of this Act shall prevent the continuous occupation during rebuilding of any portion

(c) As to existing buildings, see s. 9, *post*.

(d) The section referred to is s. 9, *post*.

(e) It is made plain by this sub-section that a building may be a high building and also a building of the class referred to in s.s. (1) (b) of s. 7.

of any building to which the said sub-section applies and which has been partially taken down burnt or destroyed. (*f*)

D. Protection against fire in certain existing buildings.—(1) From and after the first day of January 1907, in the case of any existing building (*g*) (except a dwelling-house (*h*) occupied as such by not more than one family) which is—

(a) A high building (*i*); or

(b) A building in which sleeping accommodation is provided for more than twenty persons or which is occupied by more than twenty persons or in which more than twenty persons are employed; (*k*)

the Council if in their opinion such building is not provided with proper and sufficient means of escape therefrom in case of fire may at any time serve on the owner (*l*) of such building a notice requiring him to provide such means of escape as can be reasonably required under the circumstances of the case. (*m*)

Any such notice shall specify in detail the requirements of the Council and the owner of such building shall subject to the provisions of this Act execute and do all such works and things as may be necessary (*n*) in order to comply with any requirements made by the Council under this section and (in the event of an appeal (*o*) confirmed or varied by the tribunal of appeal as hereinafter provided within such period as may be required by the Council or (in the event of an appeal the tribunal of appeal. (*p*) Provided that if such owner shall within twenty-one days after the service of such notice have submitted to the Council alternative proposals for the provision of means of escape in case of fire and the Council shall have in writing accepted the same as satisfactory it shall not be necessary for such owner to comply with any of the requirements contained in the notice served on him by the Council as aforesaid but he shall with all practicable dispatch after such acceptance as aforesaid execute and do all such works and things as may be necessary in order to provide the means of escape specified in such alternative proposals.

(2) Where any owner of a building has been convicted of an offence against this Act—

(a) By failing to comply with any requirement made by the Council under this section and (in the event of an appeal) confirmed or varied by the tribunal of appeal within the period required by the Council or the tribunal of appeal (as the case may be); or

(b) By failing to execute and do with all practicable dispatch after such acceptance as aforesaid all such works and things as may be necessary to provide the means of escape specified in such alternative proposals as aforesaid;

a petty sessional court (*q*) may notwithstanding the imposition of any penalty (*r*) make an order (*s*) prohibiting the occupation of such building (being a building of

(*f*) Were it not for this section, a building burnt or pulled down for more than one-half of its cubical extent, would be subject to s. 7 (2), *supra*.

(*g*) As defined by s. 6 (1) (vi), *supra*. Certain existing buildings must also be provided with means of access to the roof. See s. 12 (1), *post*.

(*h*) See note (1) to s. 7 (1), *supra*.

(*i*) As defined by s. 6 (1) (iv), *ante*. The powers of the Council as to high buildings are limited by ss. (1), *supra*.

(*k*) Note that this sub-section, unlike s. 7 (1) (b), *supra*, applies to buildings which are occupied by more than twenty persons or in which more than twenty persons are employed. The fact that a building within this section is adapted for the occupation of more than twenty persons will not bring it within the Act.

(*l*) As defined by s. 6 (1) (i), *supra*.

(*m*) See note (a) to s. 7 (1), *supra*.

(*n*) See s. 15, *infra*. See also note (a) to s. 7 (1), *supra*.

(*o*) See s. 22 (1) (b), *post*.

(*p*) It would appear that once requirements of the Council have been made and carried out pursuant to this section, the Council may not, in the absence of any change in the structure of the building (as to which see s. 13, *post*), require further works under the same section in the same building. See *St. James Hall Co. v. L. C. C.* (1901), 2 K. B. 250, which was decided in relation to s. 11 of the Metropolitan Management Act, 1862.

(*q*) See s. 166 of the Act of 1904.

(*r*) As to penalties, see s. 21 (1) (b) (iii), *post*.

(*s*) In writing: Act of 1904, s. 187 (1).

the class referred to in s.s. (1) (b) of this section) or any part or parts of such building or the occupation of any upper storey of such building (being a high building and not being a building of the class referred to in the said paragraph). The costs of any such proceedings and order shall be in the discretion of the court.

Any order made under this sub-section may be at any time amended or discharged by the order of a petty sessional court.

(3) The Council shall keep at the county hall a register (which shall be open at all reasonable times to inspection) of all orders made under this section.

(4) Nothing in this section contained shall authorise the Council to require in the case of a building (being a high building and not being a building of the class referred to in paragraph (b) of subsection (1) of this section) any means of escape from any storey other than an upper storey.

10. Projecting shops.—(1) Where any part of a building which is used or adapted to be used as a shop (*t*) projects for a distance of seven feet or more beyond the main front of any building of which it forms part and in which any persons are employed or sleep the projecting portion of such shop shall be provided by the owner with a roof constructed of fire-resisting materials (*u*) not less than five inches thick.

(2) It shall be lawful to construct or place in or upon the roof of the portion of any shop so projecting beyond the main front of the building as aforesaid lantern lights or ventilating cowls Provided that no such lantern light or ventilating cowl shall be constructed or placed so that any part thereof will be at a less distance than six feet from the main front of the building from which the shop projects or within such distance as may be reasonable in the circumstances of the case from any other external or party wall Provided also that the sides of such lantern light or ventilating cowl (except the side facing away from the main building) shall be carried up in fire-resisting materials (*w*) for two feet above the roof in or upon which it is constructed or placed Provided further that no part of any such lantern light or ventilating cowl shall project above the roof in or upon which the same is constructed or placed to a greater extent than five feet.

(3) The provisions of this section shall extend and apply as well to existing (*x*) as to new buildings.

(4) The Council or (in the event of an appeal (*y*)) the tribunal of appeal may in any case where it is reasonable so to do sanction subject to such conditions if any as the Council or (in the event of an appeal) the tribunal of appeal may impose in giving such sanction the exemption of any building from all or any of the provisions of this section.

11. [Rules for living rooms over premises used for storage of inflammable liquid.]

12. (z) Means of access to roofs.—(1) (A) Every existing building to which the section of this Act whereof the marginal note is "Projecting shops" applies (*a*) and every other existing building except a dwelling-house occupied as such by not more than two families; and

(b) Every new building;

shall if having more than two storeys above the ground storey (*b*) or if exceeding thirty feet in height (*c*) be provided (unless and except so far as the Council otherwise allow) (*d*) by the owner with either—

(*t*) The word shop implies a place where a retail trade is carried on; but it must be something more than a mere place for sale; it imports a place for storing also, where the commodities admit of storing; *per* Mellor, J., in *Pope v. Whalley*, 34 L. J. M. C. 80.

(*u*) This expression, as applied to a projecting roof, is defined by s. 5, *ante*, and Scheds. I., II. (4), *post*.

(*w*) As to fire-resisting materials for lantern cowls, see Sched. I. (11.) (7), *post*.

(*x*) As to the provision of means of access to the roof in such buildings, see s. 12 (1), *post*.

(*y*) See s. 22 (1) (c), *post*, as to appeals.

(*z*) This sub-section has been substituted for s. 61 (2) of the Act of 1894, *ante*, p. 502.

(*a*) "Projecting shops" are defined by s. 10 (1), *ante*.

(*b*) As defined by s. 5 (11) of the Act of 1894.

(*c*) See s. 5 (21) of the Act of 1894.

(*d*) As to appeals from requirements of the Council, see s. 22 (1) (c), *post*.

- (a) A dormer window or a door opening in a suitable position approved by the district surveyor on to the roof with proper access thereto; or
- (1) A trap door in a suitable position approved by the district surveyor covered with copper or zinc and hung on hinges so as to admit of the same opening to the full extent and furnished with a counter-weight so as to ensure that the same shall open automatically when unfastened and also with a fixed or hinged step-ladder leading to the roof; or
- (c) Other proper means of access to the roof; and with a sufficient parapet or guard-rail where reasonably practical and necessary to prevent persons slipping off the roof. Any dormer window or trap-door provided under this subsection shall only be fastened in such a manner as to ensure access to the roof being always readily available from the inside of the building.
- (2) The Council or (in the event of an appeal, the tribunal of appeal may in any case where it is reasonable so to do sanction subject to such conditions if any as the Council or (in the event of an appeal) the tribunal of appeal may impose in giving such sanction the exemption of any building from all or any of the provisions of this section.
- (3) This section shall not apply to any building falling within sections 7 and 9 of this Act. (c)

13. Conversion of buildings.]—No person shall without the consent in writing of the Council or (in the event of an appeal (f)) the tribunal of appeal convert a building in such manner that such building when so converted will not be in conformity with the provisions of this Act or without such consent knowingly or wilfully permit or suffer any building when so converted to be used or occupied.

Provided that if the Council shall not within the period of one month or in the event of such period of one month commencing or expiring on any day between August 1 and September 14 both inclusive then within the period of two months after written application to the Council by the owner for such consent notify to the owner that such consent is refused and the grounds of such refusal such consent shall be deemed to have been duly given.

For the purpose of this section the expression "convert" shall include any change of use whether involving any structural alteration or not and notice of such conversion shall be given to the district surveyor by the owner or occupier of the building intended to be converted. (g)

14. Means of escape to be maintained.]—All means of escape in case of fire provided in accordance with any of the provisions of this Act or otherwise shall be kept and maintained by the owner of the building in respect whereof they are provided in good condition and repair and in efficient working order and no person shall knowingly or wilfully obstruct or render less commodious or permit or suffer to be obstructed or rendered less commodious any such means of escape as aforesaid.

15. Power to enter notwithstanding provisions of lease.]—For the purpose of carrying out or maintaining any work required to be done or maintained by the owner under any of the provisions of this Act it shall be lawful for the owner (h) of any building notwithstanding any provision to the contrary contained or implied in any lease or contract affecting such building to enter such building or any part thereof and do all such things therein or in relation thereto as may be necessary or proper in that behalf. (i)

16. Duties of district surveyors under Act.]—(1) The execution of every work to be done on or upon a building necessary to give effect to the provisions of this Act shall be subject to the supervision of the district surveyor appointed to the district in

(c) As to the duty of the district surveyor under this section, see s. 16 (3), *post*.

(f) As to appeals, see s. 22 (1) (e), *post*.

(g) As to penalty for converting without the consent of the Council, see s. 24 (1) (i), *post*.

(h) As defined by s. 6 (1) (i), *ante*.

(i) For penalty for not permitting the owner to enter a building, see s. 24 (1) (g); for preventing him executing or maintaining the work, s. 24 (1) (h).

which the building is situated in like manner as any work done to in or upon the building under the provisions of the Act of 1894. (*k*)

(2) Particulars of any means of escape required by the Council or (in the event of an appeal) the tribunal of appeal or to be provided in accordance with plans approved by the Council under the provisions of this Act shall be furnished by the Council to the district surveyor within whose district the building to which such particulars relate is situate and it shall be the duty of the district surveyor to ascertain that such means of escape are properly provided in accordance with such particulars and to report to the Council any failure to provide the same.

(3) Where any of the provisions of s.s. 10 and 12 of this Act are or become applicable to a new or to an existing building the district surveyor shall as soon as he discovers that such building is not in conformity with such provisions report such non-conformity to the Council.

17. District surveyors to notify Council in certain cases.]—The district surveyor shall notify in writing to the Council every building about to be erected in his district to which in his opinion the section of this Act the marginal note whereof is "Protection against fire in certain new buildings" (*l*) would apply and within a reasonable time after being requested in writing by the Council shall from time to time ascertain and notify in writing to the Council any building within his district or any part thereof to which in his opinion s. 9 of this Act the marginal note whereof is "Protection against fire in certain existing buildings" (*m*) applies and also upon completion of any works required to be carried out under either of such sections shall notify to the Council whether all the requirements made by the Council or the tribunal of appeal (as the case may be) have been complied with.

18. Fees to district surveyors.]—(1) The district surveyor shall be entitled to receive from and shall be paid by the builder (*n*) employed in erecting the building in respect whereof the same are chargeable, or in doing any work or matter in respect of which any service has been performed by such surveyor under the provisions of this Act, or from the owner (*o*) or occupier (*p*) of such building, or of any building in respect whereof such work or matter has been done or service performed the fees specified in Part I. of the Second Schedule to this Act and the provisions of section 157 (Periods when surveyors entitled to fees) of the Act of 1894 shall apply to the said fees and the recovery of the same.

(2) The district surveyor shall be entitled to receive from and shall be paid by the Council the fee specified in Part II. of the said Second Schedule in respect of the performance of the duties therein mentioned.

(3) Where any works or services other than those carried out or performed in pursuance of this Act are carried out or performed in respect of any building, the said fees shall be in addition to and not in substitution for any fees which may be payable under the Act of 1894 in respect of such other works or services as aforesaid.

19. Exemption of owner from penalty on conviction of actual offender.]—(1) Where an offence under this Act for which the owner of any building is liable under this Act to a penalty (*q*) has in fact been committed by an occupier or any other person that occupier or other person shall be liable to the same penalty as if he were the owner.

(2) Where the owner is charged with any such offence he shall be entitled upon information duly laid by him to have any other person whom he charges as the

(*k*) See s. 138 of the Act of 1894. A district surveyor may not act in relation to works which are under his professional superintendence. Act of 1894, s. 144, and s. 27 (1) of this Act.

(*l*) S. 7.

(*m*) S. 9.

(*n*) As defined by s. 5 (33) of the Act of 1894.

(*o*) The expression "owner" as used in this section has the meaning assigned thereto by s. 5 (29) of the Act of 1894. See s. 6 (1) (*i*), *ante*, p. 559.

(*p*) As defined by s. 5 (30) of the Act of 1894.

(*q*) See s. 24, *post*.

actual offender brought before the court (r) at the time appointed for hearing the charge against himself and if after the commission of the offence has been proved the owner proves to the satisfaction of the court that he has used due diligence to enforce the execution of the provisions of this Act and that such other person has committed the offence in question without the knowledge, consent or connivance of the owner that other person shall be summarily convicted of the offence and the owner shall be exempt from any penalty.

The person so convicted shall in the discretion of the court be also liable to pay any costs incidental to the proceedings.

20. Apportionment of expenses borne by owners.]—The owner of any building who has paid or incurred the expenses of executing any work in respect of such building which the owner of such building is required to execute under any provisions of this Act or has paid any other expenses which by any such provision as aforesaid are required to be borne (r) paid by the owner may if he thinks fit apply to the county court of the district in which such building is situate (s) and such court may thereupon issue a summons requiring the several persons entitled to any estate or interest (t) in the building to appear before the court and the court may make such order concerning such expenses or their apportionment among all the several persons entitled to any estate or interest in the building as appears to the court to be just and equitable (u) in the circumstances of the case regard being had to the terms of any lease or contract affecting such building. (w)

21. Arbitration as to incidence of damage.]—Where the occupier (x) of any building shall claim to have sustained any damage directly and solely caused by the construction of any works carried out under this Act such claim shall be referred to arbitration (y) and the arbitrator shall determine how such damage shall be borne by the persons interested in the said building having regard to all the circumstances of the case including the terms of any lease or contract affecting such building.

22. As to appeals under Act.]—(1) At any time within two months after—

- (a) The refusal or conditional grant by the Council of their approval of any plans deposited pursuant to the section of this Act the marginal note whereof is "Protection against fire in certain new buildings" or the refusal by the Council to issue a certificate pursuant to the same section;
- (b) The service on the owner of any building of notice of any requirement of the Council under the section of this Act the marginal note whereof is "Protection against fire in certain existing buildings";
- (c) The making of any requirement with respect to any building under the section of this Act the marginal note whereof is "Projecting shops" or any refusal or conditional grant of the sanction of the Council to any

(r) This step is necessary, as the Court could not convict in his absence. See *Oxford Trustees Co. v. Soley* (1900), 54 J. P. 561.

(s) This, apparently, is the only court which can have cognizance of the matter, *Horner v. Franklin* (1905), 1 K. B. 479.

(t) The freeholder or the tenant of the building would be persons interested within the meaning of this provision.

(u) The question what is just and equitable does not arise when the tenant has expressly covenanted to pay the expenses, *Morris v. Beal* (1904), 2 K. B. 583, at p. 591.

(w) This section resembles s. 14 (1) of the Factory Act, 1901, by which the owner of a factory may apply to the county court to direct that some part of the expense of providing means of escape in case of fire shall be borne by the occupier. That sub-section does not provide, however, that regard shall be had to the terms of any lease affecting the factory. The following cases, decided under that section (or s. 7 (2) of the repealed Factory Act, 1891), which was replaced by s. 14 (1) of the Act of 1901, may be referred to: *Arifing v. Economic Printing Co.* (1898), 60 L. T. 420; *Musk v. Arnold* (1902), 1 K. B. 761; *Goldstein v. Hollingsworth* (1904), 2 K. B. 578; *Morris v. Beal*, *supra*; and *Horner v. Franklin*, *supra*.

(x) As defined by s. 5 (30) of the Act of 1904. There does not appear to be anything in the context which renders that definition inapplicable.

(y) As to arbitration, see s. 173 of the Act of 1901.

exemption under the last-mentioned section or the section of this Act the marginal note whereof is "Means of access to roofs";

(d) The making of any requirement by the Council with respect to any building under the section of this Act the marginal note whereof is "Rules for living rooms over premises used for storage of inflammable liquid"; or

(e) Any refusal of the consent of the Council under the section of this Act the marginal note whereof is "Conversion of buildings";

the owner of the building to which such requirement or refusal or conditional grant relates may if he think fit appeal to the tribunal of appeal. (z)

(2) [*Right of appeal may be exercised by the National Telephone Company Limited.*]

23. Power of entry to Council and their officers and district surveyors.—(1) For the purpose of exercising their powers or performing their duties under this Act it shall be lawful for the Council or any officer of the Council duly authorised in writing by the Council in that behalf (which authority such officer shall produce if required) at all reasonable times and after reasonable notice to enter inspect and examine any building structure or premises to which he has reasonable grounds for thinking that the provisions of this Act apply.

(2) For the purpose of performing his duties under this Act it shall be lawful for the district surveyor at all reasonable times to enter inspect and examine any building structure or premises.

24. Offences against Act.—Subject to the provisions of this Act every person who does any of the things specified in this section shall be deemed to have committed an offence against this Act and shall be liable upon conviction in a summary manner to a penalty not exceeding the amount hereinafter specified in connection with such offence and to a further penalty not exceeding the amount hereinafter specified as the daily penalty in connection with such offence for every day on which the offence is continued (that is to say):—

(1) Every person who—

(a) Occupies permits to be occupied or lets for occupation any upper storey or any part of any building in contravention of the provisions of s. 7 of this Act; or

(b)—(i) Fails to comply with any requirement made by the Council under s. 9 of this Act and (in the event of an appeal) confirmed or varied by the tribunal of appeal within such time as may be required by the Council or the tribunal of appeal; or

(ii) Fails to execute and do with all practicable despatch after acceptance by the Council of any alternative proposals under the said section for the provision of means of escape in case of fire all such works and things as may be necessary to provide the means of escape specified in such alternative proposals; or

(iii) Occupies or permits to be occupied any part of or storey in a building after the making of an order of a petty sessional court under the said section prohibiting the occupation of such part of or such storey in such building unless such order has been discharged as in the said section provided; or

(c) Fails to deposit or cause to be deposited at or within the time at or within which the same are by the respective provisions relating thereto required to be deposited any notice or plans required to be deposited under the provisions of this Act; or

(d) Knowingly or wilfully uses or permits to be used any room in contravention of the provisions of s. 11 of this Act; or

(e) Fails to comply with the provisions of ss. 10 and 12 of this Act; or

(f) Neglects to keep and maintain in good condition and repair and in efficient working order or obstructs or renders less commodious or permits or

(z) The regulations made by the tribunal of appeal under s. 184 of Act of 1894, apply to appeals under this Act. See s. 27 (2), *post*.

suffers to be obstructed or rendered less efficacious any means of escape in case of fire provided in accordance with any of the provisions of this Act or otherwise; or

- (g) Refuses to admit any officer of the Council or district surveyor or other person when entitled so to do under this Act to enter survey inspect or examine any building structure work or premises which such officer or surveyor or other person is by this Act authorised to enter survey inspect or examine or refuses or neglects to afford him all reasonable facilities and assistance in such survey inspection or examination; or
- (h) Hinders or obstructs any persons empowered by this Act to enter and remain on any premises for the purpose of executing or maintaining and to execute or maintain any work required by this Act to be executed or maintained; or
- (i) Knowingly or wilfully converts or permits or suffers to be used or occupied a building in contravention of the provisions of s. 13 of this Act; (a) or
- (j) Does any other thing prohibited by this Act or fails neglects or omits to do any other thing which he is required to do under or in pursuance of this Act;

shall be liable to a penalty not exceeding twenty pounds and a daily penalty not exceeding ten pounds:

- (2) The liability to these penalties shall be without prejudice to any other proceedings whether under the Act of 1894 or this Act or any byelaw or regulation made under the Act of 1894 or otherwise but so that no person shall be punished twice for the same offence:
- (3) All such penalties as aforesaid shall be recoverable in a summary manner (b) and the provisions of s. 169 (application of penalties) of the Act of 1894 shall extend and apply to all penalties recovered by the Council under this Act.

25. *Repeal of scheduled enactment.*—The Act specified in the Third Schedule to this Act is hereby repealed to the extent specified in the third and fourth columns of that schedule.

26. *Certain provisions of Act not to apply to factories workshops or common lodging-houses.*—(1) The provisions of this Act shall not apply to any building the whole of which is a factory or workshop within the meaning of s. 14 of the Factory and Workshop Act 1901 (c) or to any common lodging-house within the meaning of any statute for the time being in force relating to common lodging-houses within London. (d)

(2) Nothing in this Act shall empower the Council to require as regards any building while used in part as a factory or workshop means of escape in case of fire to be provided from or in respect of the part so used of such building if within three years prior to the passing of this Act means of escape in case of fire have been provided from such part in compliance with the Factory and Workshop Act 1901. (e)

27. *Incorporating certain provisions of Act of 1894.*—(1) The following provisions of the Act of 1894 are hereby incorporated with and form part of this

(a) S. 13.

(b) *I.e.* in manner provided by the Summary Jurisdiction Acts. See s. 166 of the Act of 1894.

(c) 1 Edw. VII. c. 22. By that section and s. 153 (1), the London County Council have power to secure that factories and workshops as there defined shall be provided with suitable means of escape in case of fire.

(d) The statutes now in force in London are: The Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28); The Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41); The L. C. C. (General Powers) Act, 1902 (2 Ed. VII. c. clxxxi, ss. 46-57. Seamen's lodging-houses are dealt with in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). The two Common Lodging Houses Acts above referred to are repealed, except as regards London, by the Public Health Act, 1875. As to the meaning of "common lodging house," see *Parlee v. Talbot* (1905), 2 Ch. 643, and cases there cited.

(e) *I.e.* in compliance with s. 14 of that Act.

Act and shall extend and apply accordingly and have effect as fully and effectually as if the same had been re-enacted in this Act (that is to say):—

S. 144 (surveyor not to act in case of works under his professional superintendence); s. 145 (notices to be given to surveyor by builder); s. 147 (notice to be evidence of intended works); s. 156 (fees in relation to evidence before tribunal); s. 181 (power for Council to support decisions of officers before tribunal); s. 182 (tribunal may state case for opinion of High Court); s. 183 (procedure of tribunal); s. 184 (regulations as to procedure and fees); s. 185 (enforcement of decision of tribunal); s. 187 (notices to be in writing); s. 188 (service of notices); s. 190 (power for Council to annex conditions); s. 194 (plans and documents to be property of Council); s. 195 (mode of giving approval of Council to plans); s. 196 (consent how given on behalf of owners not to be found); s. 206 (duration of exemption).

(2) All regulations made and to be made by the tribunal of appeal under the said section 184 of the Act of 1894 shall apply to the procedure to be followed in cases of appeal under this Act.

28. [*Exemption of Inns of Court.*]

29. [*Exempting certain property of dock companies.*]

30. [*Exempting certain property of railway companies.*]

31. [*Exempting certain property of electric lighting companies.*]

32. [*Exempting generating station of Underground Electric Railways Company of London Limited.*]

33. [*Exempting certain property of gas companies.*]

34. *As to banks and insurance offices.*—(1) Any new or existing building used or intended to be used to the extent of not less than three fourths of its cubical extent as a bank or insurance office or partly for one and partly for the other of such purposes by not more than two companies or firms and used or intended to be used as regards the residue thereof only as a residence for or for providing sleeping accommodation for officers or servants of such companies or firms shall so long as such building is not used otherwise than as aforesaid be exempt from the provisions of this Act.

(2) The premises known as Staple Inn Holborn shall be deemed to be existing buildings to which the provisions of this section apply.

35. [*Exemption of Stock Exchange buildings.*]

36. *Exempting buildings of public wharfingers.*—Any existing building or structure in the exclusive occupation of a public wharfinger and used by him for the purposes of his business and situate upon or in immediate proximity to a dock wharf quay or riverside frontage and which is self-contained and does not abut on any building shall be exempt from the provisions of this Act. Provided that this exemption shall not apply to uptown warehouses or to any building wherein any manufacturing process is carried on or wherein any person sleeps:

“Public wharfinger” means the owner lessee or occupier of a wharf quay warehouse or granary adjoining the port of London mainly used for warehousing the goods imported into the port of London of persons other than the occupier of such premises.

37. [*Exemption of Albert Hall.*]

38. [*Exemption of certain buildings belonging to certain railway companies.*]

39. *Exemption of certain other buildings.*—The following buildings shall so long as used for their present purposes be exempt from the provisions of this Act:—

- (1) The Mansion House Guildhall and Royal Exchange of the city;
 - (2) The Sessions House at the Old Bailey and all public buildings erected or occupied by the corporation under the provisions of the City of London Police Acts;
 - (3) The buildings of the Metropolitan Cattle Market the Cattle Market at Deptford the London Central Markets the Spitalfields Market and the Shadwell Market.
40. [*Bonded warehuses to be exempt.*]
 41. [*Saving rights of Crown.*]
 42. [*Saving rights of Duchy of Cornwall.*]
 43. [*Expenses of Act how to be borne.*]

THE SCHEDULES referred to in the foregoing Act.

THE FIRST SCHEDULE.

The following materials shall for the purposes of the Act of 1894, the Act of 1898, and this Act, be deemed to be fire-resisting materials:—

(I.) For general purposes:

- (1) Brickwork constructed of good bricks well burnt hard and sound properly bonded and solidly put together—
 - (a) With good mortar compounded of good lime and sharp clean sand hard clean broken brick (f) broken flint grit or slag; or
 - (b) With good cement; or
 - (c) With cement mixed with sharp clean sand hard clean broken brick broken flint grit or slag;
- (2) Granite and other stone suitable for building purposes by reason of its solidity and durability;
- (3) Iron steel and copper;
- (4) Slate tiles brick and terra-cotta when used for coverings or corbels;
- (5) Flagstones when used for floors over arches but such flagstones not to be exposed on the underside and not supported at the ends only;
- (6) Concrete composed of broken brick tile stone chippings ballast punice or coke breeze and lime cement or calined gypsum;
- (7) Any combination of concrete and steel or iron.

(II.) For special purposes:

- (1) In the case of doors and shutters and their frames oak teak jarrah karri or other hard timber not less than one and three-quarters inches finished thickness the frames being bedded solid to the walls or partitions;
- (2) In the case of staircases and landings oak teak jarrah karri or other hard timber the treads risers stringers and bearers being not less than one and three-quarters inches finished thickness and the ceilings and soffits if any being of plaster or cement;
- (3) Oak teak jarrah karri and other hard timber when used for beams or posts or in combination with iron the timber and the iron (if any) being protected by plastering or other incombustible or non-conducting external coating not less than two inches in thickness or in the case of timber not less than one inch in thickness on iron lathing;

(f) It had been decided by a police magistrate that "broken brick" in a byelaw under the Act of 1894, meant clean broken brick, *De Lee v. Smees, Builder*, August 1, 1896, p. 105.

- (4) (a) In case of floors and roofs—
 Brick tile terra-cotta or concrete composed as described in paragraph (1.) (6) of this schedule not less than five inches thick in combination with iron or steel;
- (b) In the case of floors and of the roofs of projecting shops—
 Pugging of concrete composed as described in the said paragraph (1.) (6) not less than five inches thick between wood joists provided a fillet one inch square is secured to the sides of the joists and placed so as to be in a central position in the depth of the concrete or concrete blocks not less than five inches thick laid between wood joists on fire-resisting bearers secured to the sides of joists;
- (5) In the case of verandahs balustrades outside landings the treads strings and risers of outside stairs outside steps porticoes and porches oak teak jarrah karri or other hard timber not less than one and three-quarters inches finished thickness;
- (6) In the case of internal partitions enclosing staircases and passages terra-cotta brickwork concrete or other incombustible material not less than three inches thick;
- (7) In the case of glazing for windows doors and borrowed lights lantern or skylights glass not less than one fourth of an inch in thickness in direct combination with metal the melting point of which is not lower than 1800 degrees Fahrenheit in squares not exceeding sixteen square inches and in panels not exceeding two feet across either way the panels to be secured with fire-resisting materials in fire-resisting frames of hard wood not less than one and three-quarters inches finished thickness or of iron
- (III.) Any other material from time to time approved by the Council as fire-resisting.

THE SECOND SCHEDULE.

FEES PAYABLE TO DISTRICT SURVEYORS.

PART I.

(A) In respect of a building erected in conformity with the provisions of the section of this Act of which the marginal note is "Protection against fire in certain new buildings"; (g) or

(n) For ascertaining whether any requirement made by the Council under the section of this Act the marginal note whereof is "Protection against fire in certain existing buildings" (h) and (in the event of an appeal) confirmed by the tribunal of appeal is complied with; or

(c) For any work required under the provisions of either of the sections of this Act the respective marginal notes whereof are "Projecting shops" and "Means of access to roofs"—(i)

One fifth of the amount of the fee payable under the Third Schedule of the Act of 1894 in respect of a new building of the same character or the sum of one pound one shilling whichever shall be the greater.

PART II.

For surveying for the purpose of ascertaining and notifying or reporting any building to the Council pursuant to the provisions of the sections of this Act the

(g) *I.e.*, s. 7.

(h) *I.e.*, s. 9.

(i) *I.e.*, ss. 10, 12.

marginal notes whereof are respectively "District surveyors to notify Council in certain cases" and "Duties of district surveyors under Act." (k)

For every building to which such sections apply and for every other building which in the opinion of the Council has been reasonably inspected for the purposes of such sections a fee of seven shillings and sixpence. (l)

THE THIRD SCHEDULE.

Session and chapter.	Title or short title.	No. of section.	Extent of repeal.
57 & 58 Vict. c. cxxiii.	London Building Act, 1894	5 61 6d Second schedule.	Subsection (3f), Subsection (2). The whole section. The whole schedule.

(k) *I.e.*, ss. 17, 16.

(l) This fee is payable by the County Council. See s. 18 (2).

AN ACT FOR THE BETTER LOCAL MANAGEMENT OF THE METROPOLIS.

18 & 19 VICT. c. 120.

[14th August, 1855.]

69. *Vestries and district boards to repair, etc., all sewers vested in them, and from time to time to construct new ones, etc.*—The vestry (z) of every parish mentioned in schedule (A) to this Act, and the Board of Works for every district mentioned in schedule (B) to this Act,

shall (subject to the powers by this Act vested in the [*London County Council*]) from time to time repair and maintain the sewers under this Act vested in them, or such of them as shall not be discontinued, closed up, or destroyed under the powers herein contained, and

shall cause to be made, repaired, and maintained, such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district, and

shall cause all banks, wharves, docks, or defences abutting on or adjoining any river, stream, canal, pond, or watercourse in such parish or district to be raised, strengthened, or altered or repaired, where it may be necessary so to do, for effectually draining, or protecting from floods or inundation such parish or district; (a) and

it shall be lawful for any such vestry or district board to carry any such sewers or works through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or through or under any cellar or vault which may be under the pavement or carriageway of any street, and into, through, or under any lands whatsoever, making compensation for any damage done thereby as hereinafter provided; (b) and

it shall be lawful for any such vestry or district board from time to time to enlarge, contract, raise, lower, arch over, or otherwise improve or alter all or any of the sewers, watercourses, and works which shall be from time to time vested in them or subject to their order and control, and to discontinue, close up, or destroy such of them as they may deem to have become unnecessary:

Provided always, that no new sewer (c) shall be made without the previous approval of the [*London County Council*]; (d)

provided also, that the discontinuance, closing up, destruction, or alteration of any sewer as aforesaid shall be so done as not to create a nuisance; and if by reason thereof any person shall be deprived of the lawful use of any covered sewer, it shall be the duty of the vestry or district board to provide some other sewer or a drain as effectual for his use as the sewer of which he is so deprived:

(z) See note (p), *ante*, p. 481.

(a) See ss. 135 and 145. *R. v. St. George's, Hanover Square (Vestry)* [1895] 2 Q. B. 275.

(b) For the mode of ascertaining the amount of compensation and the method of proceeding, see s. 151. And see also ss. 225, 226, *post*.

The vestries and district boards have, under this section, more powers in respect to entry and works than the Metropolitan Board had under the equivalent section in relation to their powers. See ss. 151 and 152, comparing the same with s. 135.

(c) It appears that the word "sewer" is used here, and in all that follows, as equivalent to "drain." See s. 250, at the word "Sewer," *post*. See s. 112 of the Act of 1862, *post*, at the word "Drain."

(d) The mere fact that the requisite approval was not obtained to the construction of a sewer does not prevent it from being a sewer when made, and as such repairable by the vestry. *R. v. St. Matthew, Bethnal Green (Vestry)* (1896), 2 Q. B. 319.

provided also, that where the vestry or district board alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used. (c)

70. *Power to vestries and district boards to do work of improvement in sewers, etc., the expense of which to be divided between the party liable and the parish or district.*—Wherever any party is, by prescription, by reason of tenure, or otherwise, liable by law to maintain or do any repairs to sewers, banks, watercourses, or works (f) in any such parish or district which the vestry or district board judge it necessary to alter or improve, it shall be lawful for them to make such alterations or improvements therein as they think proper, and to divide the expense of such alterations or improvements between the party liable to such maintenance or repairs, and the parish, district, or persons who would have been wholly liable to the expense of such alterations or improvements if no party had been liable as aforesaid, so as to throw on the party liable to such maintenance or repairs such part of the expense of alterations or improvements as may be equal to what would be incurred for such maintenance or repairs, and to throw on the parish, district, or persons aforesaid the residue of such expense, and to settle and adjust such proportions, either by some general regulation or by order in each particular case, as they may think proper:

Provided always, that nothing in this Act contained shall exempt from liability to do any works, or to pay the whole cost thereof, any person who, by prescription, by reason of tenure, or otherwise by law, is so liable. (g)

73. (h) *Vestry or district board in certain cases may compel owners, etc., of houses to construct drains into the common sewer.*—If any house or building, whether built before or after the commencement of this Act, situate within any such parish or district, be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within one hundred feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, (i) to require the owner (k) of such house or building forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or building into any such sewer

(c) See *Marylebone Vestry v. Fret*, 19 C. B. N. S. 124, 214, as to a case coming within this section and not under s. 73. See also *Fulham District Bd. v. Goodwin*, L. R. 1 Ex. D. 100. Where in consequence of the provision by a vestry of a new sewer under this section, in substitution for an old one into which a house was previously drained, it became necessary to make a new drain connecting the house with the new sewer, it was held that the vestry could not under that section recover the expense of making the new drain from the owner of the house, *St. Martin-in-the-Fields Vestry v. Ward* (1897), 1 Q. B. 40.

(f) See *Chambers on Sewers*, p. 115, as to the obligation of individuals in respect of sewer works in general.

(g) The only liability to repair and maintain, *ratione tenore*, is in respect to the sewers in their true sense, and used for their genuine purposes. The "sewer" under this Act is tied down to the definition given in s. 250. But the sewer of Common Law and of the Laws of Sewers is a real sewer for the liability. See 3 & 4 Wm. IV. c. 22.

(h) This and the following sections only apply to existing houses, *Bateson v. Poor Law Board*, 33 Ch. D. 300. As to new buildings, see s. 76. "This section deals with a case in which there is a sewer vested in the vestry and a house within a certain distance from that sewer is not connected with it by a sufficient drain. In that case the vestry or board may require the owner of the house to make a sufficient drain communicating with the sewer; and, if he should not do so, they may do the work themselves and recover the expense from him." *Per Fisher, M.R.*, in *St. Martin-in-the-Fields Vestry v. Ward* (1897), 1 Q. B. 40, at p. 43. See further as to this case, s. 69, note, and note thereto.

(i) See *Isley v. Wile*, 33 L. J. M. C. 161.

(k) As to a tenant for life, see *Act v. Cressley*, L. R. 28 Ch. D. 431. See cases in the notes to s. 250 as to "owner."

Covered drains.—a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall as shall be adequate for the drainage of such house or building, and its several floors or stories, and also of its areas, waterclosets, privies, and offices (if any), and for conveying the soil, drainage, and wash therefrom into the said sewer, and to provide

fit and proper paved or impermeable sloped surfaces for conveying surface water thereto, and

fit and proper sinks, and

fit and proper siphoned or otherwise trapped inlets and outlets for hindering stench therefrom, and

Water supply, etc.—fit and proper water supply and water supplying pipes, cisterns, and apparatus for scouring the same, and for causing the same to convey away the soil, and

fit and proper sand traps, expanding inlets, and other apparatus for hindering the entry of improper substances therein, and

all other such fit and proper works and arrangements as may appear to the vestry or board, or to their officers, requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads; and

it shall be lawful for the said vestry or board to cause the said works to be inspected while in progress, and from time to time during their execution to order such reasonable alterations therein, additions thereto, and abandonment of part or parts thereof, as may to the vestry or board or their officers appear, on the fuller knowledge afforded by the opening of the ground, requisite to secure the complete and perfect working of such works; and

Penalty on owner, etc., for neglect.—if the owner of such house or building neglect or refuse, during twenty-eight days after the said notice has been delivered to such owner, or left at such house or building, to begin to construct such drain, and other works aforesaid, or any of them, or thereafter fail to carry them on and complete them with all reasonable despatch, it shall be lawful for the vestry or board to cause the same to be constructed and made, (l) and to recover the expenses to be incurred thereby from such owner in the manner hereinafter provided. (n)

74. Provision for combined drainage of blocks of houses.—If it appear to the vestry or board of any parish or district that a group or block of contiguous houses, or of adjacent detached or semi-detached houses, may be drained and improved more economically or advantageously in combination than separately, and a sewer of sufficient size already exist or be about to be constructed within one hundred feet of any part of such group or block of houses, whether contiguous, detached, or semi-detached, it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved, as hereinbefore provided, by a combined operation. (n)

75. No house to be built without drains constructed to the satisfaction of the vestry or district board.—It shall not be lawful

to erect any house or other building in any parish mentioned in schedule (A) to this Act, or in any district mentioned in schedule (B) to this Act, or

to rebuild any house or building within any such parish or district which has been pulled down to or below the floor commonly called the ground floor, or

(l) See s. 61 of the Metropolis Management Act, 1862, *post*, and ss. 74, 76, 81, 85, 86 of this Act.

(n) As to whether the vestry may demand payment of the cost of connecting up when it really forms part of a scheme under s. 69, see *St. Martin-in-the-Fields Vestry v. Ward*, *supra*. See ss. 225, 226, *post*.

(n) See Interpretation Clause (s. 250), *post*, at word "Sewer." As to combined operation, see *Bateman v. Poplar District Bd. of W.*, 33 Ch. D. 360. This section applies only to existing houses, but as to intended houses the approval of a scheme for drainage by combined operation under s. 76 is an "order" under this section. See s. 112 of the Metropolis Management Act, 1862, *post*, as to the meaning of the word "drain." See also *Greater London Property Co. v. Foot* (1899), 1 Q. B. 972.

to occupy any house or building so newly built or rebuilt,

unless a drain and such branches thereto and other connected works and apparatus and water supply as hereinbefore mentioned be constructed and provided to the satisfaction of the surveyor of the vestry of such parish or board of works for such district of such materials, of such size, at such level, and with such fall as they may direct, so that the same shall be available for the drainage of the lowest floor of such house or building, and of its several floors or stories, and also of its areas, water-closets, privies, and offices (if any), which drain shall lead from such house or building, or the intended site of such house or building, to such sewer, already made or intended to be constructed near thereto, as the vestry or board shall direct and appoint, or if there be no such sewer existing or intended to be constructed within one hundred feet of any part of the intended site of such house or building, then to such covered cesspool or other place, (o) not being under any dwelling-house, as the vestry or board shall direct; and

When house rebuilt.—wherever any house or building is rebuilt as aforesaid, the level of the lowest floor of such house or building shall be raised sufficiently to allow of the construction of such a drain and such branches thereto, and other works and apparatus as are hereinbefore required, and for that purpose the levels shall be taken and determined under the direction of the vestry or district board. (p)

73. Notice of buildings to be given to the vestry or district board before commencing the same (q).—Before beginning

to lay or dig out the foundation of any new house (r) or building within any such parish or district, or

to rebuild any house or building therein, and also

before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district,

seven days' notice in writing shall be given to the vestry or board, by the person intending to build or rebuild such house or building or to make such drain; and

Level of foundations.—every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and

every such drain shall be made in such direction, manner, and form, and of such materials and workmanship, as and with such branches thereto and other connected works and apparatus and water supply as hereinbefore mentioned, and as the vestry or board shall order, (t) and the making of every such drain shall be under the survey and control of the vestry or board; and

the vestry or district board shall make their order in relation to the matters

(q) See s. 66 of the Metropolis Management Act, 1862, *post*.

(r) As to the provisions relating to the construction of sewers in new streets, see s. 52 of 25 & 26 Vict. c. 102, *post*, and s. 57, *post*, as to an appeal.

(s) See also the London County Council (General Powers) Act, 1891, 53 & 54 Vict. c. 221, s. 42, which provides for notice to be given to vestry or district board of building or demolishing any house, building, or wall.

(t) See s. 88 of 25 & 26 Vict. c. 102, *post*, p. 588, and the Metropolis Management Amendment Act, 1890, s. 4, *post*, p. 606, as to penalty for not giving notice and for making sewer contrary to plans approved. See s. 161 of the London Building Act, 1904, *ante*, p. 52, as to regulations by the County Council with respect to sites and foundations of houses. See s. 5 of the Building Act, 1904, as to meaning of "building."

(u) See *Clarke v. P. Division Vestry*, 5 Jur. N. S. 138; and as to the discretion of the board or vestry with respect to the materials to be used, see *Arden v. St. Mary, Leith* (Vestry), 37 L. J. Ch. 677.

(v) For an example of an "order" which was upheld, see *London School B. v. Fulham Local Council*, 68 J. P. 117. As to the meaning of the term "order," see further *Stokes v. Hudson* (1901), 61 J. P. 756. It is not necessary for the vestry to make a fresh regulation as to each particular case, and that the general regulations must be complied with. *First v. Fulham Vestry* (1900), 61 J. P. 629.

aforesaid, and cause the same to be notified to the person from whom such notice was received within *seven days* (u) after the receipt of such notice; and

in default of such notice, or

if such house, building, or drain, or branches thereto or other connected works and apparatus and water supply, be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid, or the provisions of this Act,

it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto and other connected works and apparatus and water supply to be relaid, amended, or re-made, or, in the event of omission, added, as the case may require, and to recover the expenses thereof from the owner thereof in the manner hereinafter provided. (x)

78. Power to vestry or district board to branch private drains into sewers, at the expense of the party to whom they belong.—Whenever it is necessary to open any part of the pavement of any street (y) or public place, for the purpose of making or branching any private drain into any of the sewers or drains vested in the [*London County Council*], or any vestry or district board under this Act, or authorised to be made by them under this Act, it shall be lawful for the vestry or board, in case they think fit so to do, to make so much and such part of such private drain, and also to construct so much and such part of the work necessary for branching the same into the public sewers as shall be under or in any street, and to recover the expenses incurred thereby from the owner of the house, building, or ground to which such private drain belongs, in the manner hereinafter provided. (z)

79. Vestry or district board may agree to make house drains at the expense of owners or occupiers.—It shall be lawful for any such vestry or board to contract and agree with the owners or occupiers of any houses, buildings, or ground that any drains required to be made, altered, or enlarged by such owners shall be constructed, made, altered, and enlarged by the vestry or board; and the cost price of making, altering, or enlarging such drains, as certified by the surveyor of the vestry or board, shall be repaid by the owner or occupier so agreeing to the vestry or board, and in default of payment the same may be recovered in the manner hereinafter provided. (a)

80. Vestry or district board may order a contribution towards construction of sewers in certain cases.—Where any sewer in any of the parishes mentioned in either of the schedules (A) and (B) to this Act, into which any drain shall be made or branched, has been built since the third day of September, 1813, and before the commencement of this Act, at the expense of any person or body other than any Commissioners of Sewers, the vestry or district board in whom such sewer is vested may order such sum as they may deem just to be paid and contributed by the owner of the house to which such drain belongs towards the expense of the construction of such sewer, which sum shall, on the receipt thereof by such vestry or board, be paid over to the person or body aforesaid, and such vestry or board may, if they see fit, order and accept payment of such sum, with interest after a

(u) Extended to fifteen days by s. 63 of the Metropolis Management Act, 1862, *post*, 25 & 26 Vict. c. 102.

(x) See ss. 225, 226, *post*, as to recovery of expenses, etc. An opportunity must be given to the owner to appear and show cause against the proposed demolition. *Cooper v. Wandsworth District Bd.*, 32 L. J. C. P. 185. Compare *Masters v. Pontypool L. Bd.*, L. R. 9 Ch. D. 677. See s. 145 of the Building Act of 1894, *ante*.

(y) This section applies although the street is merely a "builder's road." A road is not the less a street, because it comes within the definition of a "new street" in s. 112 of the Act of 1862. This section applies to new streets as defined in s. 112 of the Act of 1862. *St. John, Hampstead (Vestry) v. Hooper*, 15 Q. B. D. 652. As to penalty for making or branching any sewer or drain into any sewer vested in a vestry or district board without approval, see Metropolis Management Amendment Act, 1890, s. 5, *post*.

(z) See ss. 225, 226, *post*. S. 77 is repealed by s. 61 of the Act of 1862, *post*.

(a) See *Hall v. Batley (Mayor)*, 47 L. J. Q. B. 148.

rate not exceeding five pounds for the hundred by the year, by instalments within any period not exceeding twenty years. (b)

83. (c) *Penalty on persons improperly making or altering drains.* (d)—In case any drain, watercloset, privy, cesspool, or water supply, or water supply apparatus, or other connected works or apparatus hereinbefore mentioned, be found, on inspection, not to have been made or provided according to the directions or regulations (e) of the vestry or district board, or contrary to the provisions of this Act, or

in case any person without the consent of the vestry or district board construct, rebuild, or unstop any sewer, drain, watercloset, privy, or cesspool which may have been ordered by them not to be made or to be demolished or stopped up, or

in case any person discontinu any water supply, or destroy any connected works or apparatus as aforesaid, or

in case any person, without the consent of the vestry or district board, break into any sewer vested in such vestry or board,

every person (f) so offending shall forfeit and pay any sum not exceeding ten pounds; and

in case the person so making any sewer, drain, watercloset, privy, cesspool, or other work or apparatus as aforesaid, contrary to the directions or regulations of the vestry or board, or

contrary to the provisions of this Act, or

without such consent as aforesaid constructing, rebuilding, or unstoping any sewer, drain, watercloset, privy, or cesspool which may have been ordered to be demolished or stopped up, or discontinuing any water supply or destroying any connected works or apparatus as aforesaid, or breaking into any such sewer as aforesaid, do not within fourteen days after notice in writing by the vestry or board cause such sewer, drain, watercloset, privy, or cesspool to be altered or reinstated in conformity with the directions of the vestry or board, or, as the case may be, to be demolished or stopped up, or such water supply to be renewed, or such connected works or apparatus to be restored,

then and in every such case the vestry or board may cause the work to be done, and the expense thereof shall be paid by the person who has so offended.

84. (g) *Where no default found expenses to be paid by vestry or board.*—If such drain, watercloset, privy, cesspool, or water supply, or water supply apparatus, or other connected works, and apparatus, be found on inspection as aforesaid, to be made to the satisfaction of the vestry or board, and in proper order and condition, they shall cause the same to be reinstated and made good as soon as may be; and the expense of examination, reinstating, and making good such drain, watercloset, privy, cesspool, or other works or apparatus as aforesaid, shall be defrayed by the vestry or board, and full compensation shall be made by them for all damage or injuries done or occasioned by the examination of any such drain, watercloset, privy, cesspool, or other works or apparatus as aforesaid.

85. (h) *Vestry or district board to cause drains, &c., to be put into proper condition,*

(i) By s. 59 of 25 & 26 Vict. c. 102, *post*, this is extended to main sewers, and to sewers built since January 1, 1862, or to be built at any future time at the expense of private individuals.

(j) This section is partially repealed by the Public Health (London) Act, 1891, which see *post*.

(k) See ss. 68 and 69 of 25 & 26 Vict. c. 102, *post*.

(l) A direction that, in making certain drains all "old brick and other decayed drains on the premises be broken up and destroyed, and the materials forming them, and all foul and noisome, charged earth and other substances carefully removed from the premises, dry earth or broken or brick rubbish being brought in if necessary in the place of them," was held to be good and capable of enforcement in *London School Bd. v. Fulkam B. C.* (1894), 68 J. P. 117.

(m) Extended by s. 61 of 25 & 26 Vict. c. 102, *post*, to all persons causing the commission of the offence.

(n) These sections are partly repealed by the Public Health (London) Act, 1891, which see *post*. See also *London Vestry v. London County Council* (1897), 2 Q. B. 76.

etc., where necessary.—If, upon such inspection as aforesaid, any drain, watercloset, privy, or cesspool appear to be in bad order and condition, or to require cleansing, alteration or amendment, or to be filled up, the vestry or board shall cause notice in writing (*h*) to be given to the owner or occupier of the premises upon or in respect of which the inspection was made, requiring him (*i*) forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works; and, if such notice be not complied with by the person to whom it is given, the vestry or board may, if they think fit, execute such works, and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises.

96. Powers and duties of surveyors of highways and property vested in them, transferred to vestries and district boards.—Every vestry and district board shall, within their parish or district (exclusively of any other persons whatsoever), execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office under the laws for the time being in force, so far as such powers, authorities, duties, and liabilities are not inconsistent with this Act; (*k*) but

all expenses which under any such law ought to be defrayed by highway rates shall be defrayed by means of the rates to be raised under this Act, and all moneys which would be applicable in aid of such highway rates shall be applied in aid of the said rates to be raised under this Act, and no such vestry or board shall be subject to any provisions concerning the accounts of surveyors of highways, or requiring any returns to be made to any special sessions; and

all streets, being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate. (*l*)

98. Vestry or district board to cause streets to be paved.—It shall be lawful for every vestry and district board from time to time to cause all or any of the streets (*m*) within their parish or district, or any part thereof respectively, to be paved or repaired when and as often and in such form and manner and with such materials

(*h*) As to what constitutes a notice within this provision, see *Swinbourn v. Hammersmith Corporation* (1903), 67 J. P. 259.

(*i*) The danger of doing works at the request of a local authority where that authority has in fact no power to request such works to be done, is illustrated by *Ellis v. Bromley Rural Council*, 81 L. T. 224.

(*k*) *Blackmore v. Mile End Old Town Vestry*, L. R. 9 Q. B. D. 451; 51 L. J. Q. B. 496; 46 L. T. 869; 30 W. R. 740; 47 J. P. 52.

(*l*) This section does not vest in the board the absolute property or fee simple in the soil, but only an interest commensurate with the purposes for which it is vested, and limited to the period during which those purposes require it to be held. *Rolls v. St. George's Vestry*, 28 W. R. 867, where *Corerdale v. Charlton*, 4 Q. B. D. 104, is explained; and see *Great Eastern Ry. Co. v. Hackney Bd. of W.*, 8 App. Cas. 687, as to the vesting of the fabric of a railway bridge over a cutting much below the level of the highway.

This section does not confer upon a vestry or a board of works (constituted under the Act) such a property in the streets situate within their district as to entitle them to maintain an action for an injunction against the erection of a telephone wire across a street, the wire being erected at a great height and causing no appreciable danger to the public or to the traffic in the street. *Wandsworth Bd. of W. v. United Telephone Co.*, L. R. 13 Q. B. D. 904. See also *St. Mary, Battersea (Vestry) v. County of London, etc., Electric Lighting Co.* (1899), 1 Ch. 474.

Compare s. 144 of the Public Health Act, 1875, *post*, and see also Chap. XXII., *ante*, as to dedication of roads.

See *Hamilton v. St. George's, Hanover Square*, L. R. 9 Q. B. 42. A metropolitan borough council has power to enter into an agreement with a landowner as part of a scheme for widening a road to remove a sign-post belonging to him to a position on the edge of a public footpath. *Hoare v. Lewisham (Borough)* (1902), 85 L. T. 281.

(*m*) See s. 250, *post*, p. 589, as to the word "street"; s. 244 places the footpaths and turnpike roads under the management of vestries and district boards. And see *Crosse v. Wandsworth District Bd. of W.* (1898), 62 J. P. 807.

as such vestry or board think fit, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running to, into, or through the same to be turned or altered, in such manner as they think proper, and to alter the position of any mains or pipes in or under such street, such alteration to be made subject to the approval of the engineer of the company to which such mains or pipes belong.)

99. *Owners possessing freehold of courts, etc., to pave the same.*—Provided always, that whenever the freehold of any court, passage, or public place, not being a thoroughfare, is vested in the owner of any adjoining house, the paving of such court, passage, or public place shall be done by such owner, if deemed expedient or necessary by the vestry or district board.

100. *Owner of courts to drain them, and keep the pavement, etc., in repair.*—The owner of any such court, passage, or public place, not being a thoroughfare, shall, if required by the vestry or district board of the parish or district in which the same is situate, to the satisfaction of such vestry or district board, sufficiently pave, cover the surface of, or repair the same, and lay, at a proper level, through, over, under, or along such part thereof as such vestry or board may require, a drain, channel, or gutter, and keep such pavement or covering, and drain, channel, or gutter, in good repair, to the satisfaction of such vestry or board; and

Penalty on owners for neglect.—If any such owner of any court, passage, or public place, not being a thoroughfare, do not sufficiently pave or cover the same as aforesaid, or do not lay down therein such drain, channel, or gutter, or do not repair the same respectively, to the satisfaction of such vestry or board, within fourteen days after notice in writing requiring him so to do has been given to him by such vestry or board, every such person so offending shall forfeit and pay any sum not exceeding five pounds. (p)

101. [*Vaults and cellars under streets not to be made without the consent of the vestry or board.*]

102. [*Vaults, etc., under streets to be repaired by owners or occupiers.*] (q)

105. (r) *Provisions for paving new streets.*—In case the owners of the houses (s) fronting the greater part of any new street (t) laid out or made, or hereafter to be

(a) See s. 100, *post*, *R. v. Train*, 31 L. J. M. C. 169; *Southwark, etc., Water Co. v. Wandsworth District Bd.* (1898), 2 Ch. 603; *Harvey v. Train R. D. Co.* (1903), 2 Ch. 608. As to the meaning of the word "pave," see s. 112 of the Metropolis Management Act, 1862, *post*.

(c) When a borough council, in exercise of their powers under this section and s. 100, have called upon the owner of a private courtyard or mews to pave the same in a particular manner, as, for instance, with macadam, they cannot afterwards require him to re-pave the same in some other manner, as for instance, with asphalt or concrete. When once a pavement has been laid in compliance with a notice under these sections, the powers of the borough council are limited to calling upon the owner to repair and keep the pavement in repair. *Harris v. New St. Mews Owner* (1906), 73 L. J. K. 10, 519. See also ss. 77 and 78 of the Metropolis Management Act 1862, *post*.

(p) By s. 81 of the Metropolis Management Act, 1862, *post*, the vestry may execute the works, and recover the expenses.

(q) See s. 225, 226, *post*. As to the kind of cellars to which this provision applies, see *Holmes v. St. Leonard's, Harrow Spire*, L. R. 9 Q. B. 42. Ss. 103 and 104 are repealed by the Public Health (London) Act, 1901, *post*.

(r) As to removing a wheel under a street, road, passage, or way, see Metropolis Management Amendment Act, 1890, s. 6, *post*. This section should be read together with s. 77 of the Metropolis Management Act, 1862, *post*.

(s) "House" includes every building capable of use as a human habitation. If a building physically capable of being so used is prevented, either by common law or statute, from being ever put to such a use, it is exempted; thus, a consecrated church of the Established Church is exempted, but not a chapel vested in trustees for use for religious worship by Wesleyans. *Wright v. Lodge*, 16 Q. B. D. 479.

S. 77 of the Metropolis Management Act, 1862, *post*, makes owners of land boundary or adjoining on such street liable to contribute.

(t) The question as to what is a new street is one of fact for the magistrate to decide. *Lee v. Epsom Vestry* (1899), 72 L. T. 190. The phrase "new street" has also been explained in

laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or

if such vestry or board deem it necessary or expedient that the same should be so paved,

then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and foot-paths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; (u) and

the owners (w) of the houses (x) forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement [such amount to be determined by the surveyor for the time being of the vestry or board]; (y) and

in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money had been paid; and

in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses. (z)

Crosse v. Wandsworth District Bd. of W., 79 L. T. 351. See also *Property Exchange* (No. 1) v. *Wandsworth Bd. of W.*, 65 J. P. 407; *St. Mary, Battersea (Vestry) v. Palmer* (1897), 1 Q. B. 220; *Elsdon v. Hampstead (Mayor)* (1905), 2 Ch. 633; *White v. Fulham Vestry* (1896), 74 L. T. 425. See also s. 112 of the Metropolis Management Act, 1862, *post*, as to meaning of "new street."

By s. 150 of the Public Health Act, 1875, the parties are described as "the owners or occupiers of the premises fronting, adjoining, or abutting on private streets," and the decisions under that provision may be referred to with respect to the above section. See cases cited in the notes to that section. See also *Pound v. Plumstead Bd. of W.*, L. R. 7 Q. B. 183; *Islington Vestry v. Barret*, L. R. 9 Q. B. 278; *Baddiley v. Gingell*, 1 Ex. 319; *London School Bd. v. Islington Vestry*, L. R. 1 Q. B. D. 65. See *Wilson v. St. Giles, Camberwell (Vestry)*, [1892] 1 Q. B. 1; *Davis v. Greenwich Bd. of W.*, [1895] 2 Q. B. 219; and *St. Giles, Camberwell (Vestry) v. Hunt*, 56 L. J. M. C. 65, for cases where the vestry has already once paved out of the general rates; permanent, but not temporary, paving prevents the powers of this section being subsequently exercised.

(u) See *A.-G. v. Wandsworth District Bd.*, 6 Ch. D. 539; and *R. v. Hackney District Bd.*, L. R. 8 Q. B. 528, as to subsequent repairs.

(w) Where the owners of land sold for building formed roads, and dedicated them to the public, they were held not to be the "owners" within these Acts. *Plumstead Bd. of W. v. British Land Co.*, L. R. 10 Q. B. 203, distinguishing *Pound v. Plumstead*, L. R. 7 Q. B. 183, *supra*. See *Holland v. Kensington Vestry*, L. R. 2 C. P. 565, as to the non-liability of the owner in fee of land let for building; and *Driscoll v. Battersea (Borough)* (1903), 1 K. B. 881, as to non-liability of a builder. See the cases cited under ss. 5 and 173 of the Building Act, 1894, *ante*.

As to apportionment of expenses, see *Chelsea Vestry v. Evans*, 31 J. P. 404; *Nesbitt v. Greenwich District Bd.*, L. R. 10 Q. B. 465.

An apportionment should refer to the owners by name, or at least ought to specify the properties to be charged in such a way as to preclude the possibility of mistake. *Elsdon v. Hampstead (Mayor)* (1905), 2 Ch. 633.

In *Mill End Vestry v. Whitechapel Union*, L. R. 1 Q. B. D. 680, an apportionment of the expenses on owners of houses on one side only, and in *Whitchurch v. Fulham Bd.*, L. R. 1 Q. B. 233, amongst the owners of sections separately, were respectively held bad. But see *Wakefield Urban Authority v. Mander*, L. R. 5 C. P. D. 248; 28 W. R. 922, which is directly to the contrary. See also the decisions under s. 150 of the Public Health Act, 1875, *post*. Expenses recovered in 1885, through work done and apportionment made in 1871, *Wortley v. St. Mary, Islington*, 51 J. P. 166. The conservators of a public navigable river have been held to be "owners" within this section. See *Hackney Borough Council v. Lee Conservancy* (1904), 2 K. B. 541.

(x) See s. 77 of the Act of 1862, *post*, p. 597.

(y) The phrase (in brackets) includes a person by resolution designated a surveyor to the board, the office of surveyor being at the time in abeyance, and *Lewis v. Weston L. Bd.* (1889), 40 Ch. D. 35, is no authority to the contrary. *Kendal v. Metropolitan Borough of Lewisham*, 67 J. P. 236, *Builder*, April 11, 1903, p. 400.

(z) The joint effect of this section and s. 77 of the Act of 1862, is that paving expenses may

103. [Vestry or board may repair any street, not being a highway.]—The vestry or district board of any parish or district may, if they think fit, by notice in writing put up in any part of any street in their parish or district, not being a highway, declare their intention of repairing the same under this Act, and thereupon the same shall be from time to time repaired by them under the authority of this Act. (b)

107. [Act not to authorise the making any thoroughfare without the consent of the proprietor of the estate.]—Nothing in this Act shall extend or be construed to extend to authorising the taking down or removing any bar, gate, rail, or other fence fixed for preventing any thoroughfare into or from any square, street, or way, without the consent of the proprietor of the estate or property upon which such bar, gate, rail, or other fence, square, street, or way shall be situate.

109. [Notice to be given by companies to vestries and district boards when pavements, &c., is required to be taken up.]

110. [Streets not to be broken up, except under the superintendence of vestry or board. Streets broken up to be reinstated without delay.]

111. [Penalty on persons who take up pavements but neglect to reinstate them, and to put up lights during the night-time to prevent accidents.]

114. [Power to vestry or district board to reinstate pavement, and charge the expenses to the parties.]

119. [d. Owners, &c., to remove future projections into streets, on notice from vestry or district board.]—If any porch, shed, projecting window, step, cellar door or window, or steps leading into any cellar or otherwise, lamp, lamp-post, lamp-iron, sign, sign-post, sign iron, show-board, window shutter, wall, gate, fence, or opening, or any other projection or obstruction placed or made against or in front of any house or building after the commencement of this Act, shall be an annoyance, or in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street in their parish or district, it shall be lawful for the vestry or district board to give notice in writing to the owner or occupier of such house or building to remove such projection or obstruction, or to alter the same, in such manner as the vestry or board think fit, (f) and

such owner or occupier shall, within fourteen days after the service of such notice upon him, remove such projection or obstruction, or alter the same in the manner directed by the vestry or board: and

Penalty for neglect.—if the owner or occupier of any such house or building neglect or refuse, within fourteen days after such notice, to remove such projection

be recovered either by action or summary proceeding either from the original owner of a house or land or from a succeeding owner. *Hampden v. Cress* (1906), 2 K. B. 1.

Although the "owner" of a house is liable to the vestry, the ultimate liability will depend upon the rights of the landlord and tenant as regulated by their contract, as to which, see *Ash v. Brown*, 9 Q. B. D. 62; *White v. Colver*, 13 Q. B. D. 1; *Adridge v. Ferne*, 17 Q. B. D. 112. As to tenant for life and remainderman, see *Re Field, Bowring v. Field*, W. N. 1884, p. 56. As to what amounts to a new street within the meaning of this section, see *White v. Fisham Vestry* (1896), 74 L. T. 425. See as to new streets generally, Part II. of L. H. A., 1891, ante.

(a) See now as to repair of a road or way not being a street, the Metropolis Management Amendment Act, 1891, s. 8, post, p. 606.

(b) A proviso to this section was repealed by s. 89 of the Metropolis Management Act, 1862, post.

(d) This section is inconsistent with and implicitly repeals s. 72 of 57 Geo. III. c. 29 Michael Angelo Taylor's Act, *Fortescue v. Vestry of St. Matthew, Bethnal Green*, [1861] 2 Q. B. 172. See also s. 73 of the London Building Act, 1844, ante.

(e) All these cases are nuisances (for which "annoyance" is only another word) a common law.

(f) See *Le Neve v. Mole End Coal Trades' Union*, 97 L. J. Q. B. 288, as to a movable shed.

or obstruction, or to alter the same, in the manner directed by the vestry or board, he shall forfeit any sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during which such projection or obstruction continues after the expiration of such fourteen days from the time when he may be convicted of any offence contrary to the provisions hereof. (g)

120. *Vestry or district board may remove existing projections into streets, and make compensation for the same.*—It shall be lawful for every vestry and district board, if any projection or obstruction which has been placed or made against or in front of any house or building in any such street before the commencement of this Act shall be an annoyance as aforesaid, to cause the same to be removed or altered as they think fit:

Provided always, that the vestry or board shall give notice in writing of such intended removal, or alteration to the owner or occupier against or in front of whose house or building such projection or obstruction shall be, seven days before such removal or alteration shall be commenced, and shall make reasonable compensation (h) to every person who shall incur any loss or damage by such removal, excepting in cases where the obstruction or projection may now be removable under any Act, in which case no compensation shall be made.

121. (i) *Hoards to be erected during repairs.*—Every person who shall build or begin to build, or take down or begin to take down, any house, building, or wall, or alter or repair, or begin to alter or repair, the outward part of any house, building, or wall,

shall, in all cases in which the footway is thereby obstructed or rendered inconvenient, cause to be put up a proper and sufficient hoard or fence, with a convenient platform and handrail, if there be room enough for the same, to serve as a footway for passengers outside of such hoard or fence, and

shall continue such hoard or fence, in such cases as aforesaid, with such platform and handrail, standing and in good condition, to the satisfaction of the vestry or district board of the parish or district in which such house, building, or wall is situate, during such time as may be necessary for the public safety or convenience, and

shall, in all cases in which the same is necessary to prevent accidents, cause such hoard or fence to be well lighted during the night; and

Penalty on not erecting hoards.—every such person who fails to put up such hoard or fence and such platform, with such handrail as aforesaid, or who does not, whilst the said hoard or fence is standing, keep the same well lighted during the night, shall for every such offence forfeit a sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during the continuance of such default.

122. *No hoard to be erected without licence from vestry or district board.*—It shall not be lawful for any person to erect or set up in any street any hoard or fence or scaffold for any purpose whatever, or any posts, bars, rails, boards, or other things by way of inclosure, for the purpose of making mortar, or of depositing bricks, lime, rubbish, or other materials,

without a licence in writing first had and obtained from the clerk or surveyor of the vestry or district board of the parish or district in which such street is situate; and

every such licence shall state the place where and the purpose for which such hoard or fence, scaffold or inclosure, is to be set up or made, and the size thereof, and the time for which it is to be permitted to continue. (k)

(g) See s. 200 of the Building Act, 1894, *ante*.

(h) As to the mode of assessing compensation, see ss. 225 and 226, *post*.

See s. 73 of the London Building Act, 1894, *ante*.

(i) And see now s. 32 of the London Council (General Powers) Act, 1890 (Private Act).

(k) See *R. v. Commissioners of Sewers of City of London*, 22 L. T. N. S. 582, as to what licence may be required; and *R. v. Shoreditch Vestry*, 20 J. P. 404, as to the discretion of the vestry. And see s. 200 of the Building Act, 1894, *ante*.

123. *If hoard be erected or materials be deposited in any manner otherwise than to the satisfaction of the vestry or district board, the same may be removed.*—If any person erect or set up in any street

any hoard or fence or scaffold for any purpose whatever, or any posts, bars, rails, boards, or other things by way of inclosure, for the purpose of making mortar, or of depositing bricks, lime, rubbish, or other materials, without a licence from the vestry or district board, or do any such act as aforesaid in any other manner than as permitted by such licence, or

continue the same beyond the time stated in such licence, or

fail to keep any hoard, fence, platform, or haul-trail in good repair, he shall for every such offence forfeit a sum not exceeding five pounds, £5, and a further sum not exceeding forty shillings for every day during the continuance of such offence; and

it shall be lawful for the vestry or board to cause such hoard, fence, scaffold, or inclosure to be pulled down, and the materials thereof, and also all the bricks, mortar, lime, or other building materials, or other matters or things contained within any such inclosure, to be removed, and deposited in such place as the vestry or board may think fit, and to be kept until the charges of pulling down and removing the same be paid to the vestry or board; and in case the same be not claimed and the said charges paid within the space of eight days next after such seizure thereof, it shall be lawful for the vestry or board to order the same to be sold, and by and out of the proceeds of such sale to pay such charges, rendering any surplus to the owner or other person by law entitled thereto; and in case the proceeds of such sale be insufficient to cover such charges and the charges of selling and disposing of such materials, matters, and things, the deficiency shall be repaid by the owner of such materials, matters, and things to the vestry or district board, on demand. (m)

124. *Providing against accidents in laying out new streets, etc.*—Every person laying out or opening any new street, or building therein, shall, during the operations necessary for forming such new street, or for building therein, take all such precautions for guarding against injury to the passengers along such street as may be directed by the vestry or district board of the parish or district within which such operations are being carried on; and

if any person fail to comply with the directions of such vestry or district board, within such time as may be limited by them, such vestry or district board may do whatever may be necessary for carrying the same into effect, and the expenses thereby incurred shall be repaid to such vestry or district board by the person laying out or opening such new street, or building therein, as aforesaid, and shall be recoverable by them from such person in manner provided by this Act.

202. *Power to London County Council, district boards and vestries, (p) to make byelaws.*—The [London County Council] and every district board and vestry respectively may from time to time make, alter, and repeal byelaws for all or any of the purposes following; (that is to say)

for regulating the business and proceedings at their meetings and of committees appointed by them,

the appointment and removal of their officers and servants, and

the duties, conduct, and remuneration of such officers and servants;

and the said [Council] may also from time to time make, alter, and repeal byelaws

for regulating (n) the material of the pavement and roadway of new streets and roads, (o) and

(l) See s. 227, *post*.

(m) See s. 201 of the Building Act, 1894, *ante*.

(p) See note (p), *ante*, p. 481.

(a) The words "the plan, level, width, surface inclination, and" and "and the plans and levels of sites for building," are repealed by the London Building Act, 1894.

(n) See the London County Council Byelaws and Regulations, *post*, p. 611. As to what may be required by byelaws, see *London v. Birmingham Commissioners*, 32 L. J. M. C. 107; *Isleworth v. Mayor of Richmond*, 2 L. R. 4. And *Ham v. Surrey*, 10 Q. B. 102. It was held

for regulating the dimensions, form, and mode of construction, and the keeping, cleansing, and repairing, of the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith; (p) and

for regulating the form of appeal and mode of proceeding thereon; and generally for carrying into effect the purposes of this Act;

Penalty may be imposed for breach of byelaws.—and every such board and vestry may thereby impose such reasonable penalties as they think fit, not exceeding forty shillings for each breach of such byelaws, and in case of a continuing offence (q) a further penalty not exceeding twenty shillings for each day after notice of the offence from the board or vestry:

Power to justices to remit penalties.—Provided always, that under every such byelaw it shall be lawful for the justices before whom any penalty imposed thereby is sought to be recovered to order the whole or part only of such penalty to be paid, or to remit the whole penalty:

provided also, that no byelaws shall be repugnant to the laws of England or to the provisions of this Act; and that no byelaw shall be of any force or effect unless and until the same be submitted to and confirmed at a subsequent meeting of the board or vestry:

provided also, that no penalty shall be imposed by any such byelaw unless the same be approved by one of Her Majesty's principal Secretaries of State. (r)

203. [*Publication and Evidence of Byelaws.*]

204. *Buildings not to be made over sewers without consent.*—No building (s) shall be erected in, over, or under any sewer (t) vested in the [*London County Council*], or in any vestry or district board, without their consent first obtained in writing; and

if any building be erected contrary to this provision, the board or vestry in whom such sewer is vested may demolish the same, and the expenses incurred thereby shall be paid by the person erecting such building.

211. [*Power to appeal to the London County Council against orders and act of vestries and district boards in relation to construction of works.*] (u)

215. [*Where two or more persons are to do any act or pay any sum of money, vestry or district board may apportion the same.*]

216. [*Power to vestries and district boards to spread repayment of expenses over a period not exceeding twenty years.*]

220. *Service of notices, etc., on metropolitan and district boards and vestries.*—Any summons or notice, or any writ or other process at law or in equity, or any other matter or thing whatsoever, required to be served upon the [*London County Council*], or any district board or vestry, may, unless herein otherwise provided, lawfully be

under s. 16 of 41 & 42 Vict. c. 32 that byelaws under that Act were governed by the interpretation of words given in the Act, *Blashill v. Chambers*, 14 Q. B. D. 479. By the Interpretation Act, 1889, s. 31, expressions used in rules, regulations, or byelaws, made after the commencement of that Act under statutory power, are, unless the contrary intention appear, to have the same respective meanings as in the Act conferring the power. As to reasonableness of byelaws, see *Treasure & Co. v. Bermondsey B. C.* (1904), 68 J. P. 206.

(p) Some provisions which followed here as to privies and cesspools are repealed by the Public Health (London) Act, 1891, *post*, p. 609.

(q) Compare s. 158 of the Public Health Act, 1875, *post*, p. 630.

(r) See *Kingsland v. Haben*, 68 J. P. 159, a case on byelaws made under this section; and *Metropolitan Industrial Dwellings Co. v. Long* (1904), 68 J. P. 113.

(s) See note to s. 5 of the Building Act, 1891, *ante*, as to the word "building;" and see s. 75 of the Act of 1862.

(t) See ss. 68 and 69 of the Act of 1862, *post*, as to penalties on persons placing buildings on, and interfering with, sewers.

(u) See s. 57 of the Met. Man. Act, 1862, *post*.

See *Tinkler v. Wandsworth District Bd.*, 27 L. J. Ch. 312, as to the jurisdiction of the Chancery Division.

See s. 29 of 25 & 26 Vict. c. 102.

served by delivering the same personally to the clerk of such respective [Council], board or vestry, or by leaving the same at the principal office of such [Council], board or vestry. (x)

221. Service of notices on owners and occupiers and other persons.]—All notices by this Act required to be given to the owner or occupier of any land or premises, or other person, may be

served personally on such owner, occupier or person, or left with some inmate of his place of abode, and any notice required to be given to any such owner or occupier may, if there be no occupier, be affixed to some conspicuous part of the land or premises, and it shall not be necessary in any notice to any owner or occupier of any land or premises to name such owner or occupier :

Provided always, that where there is no occupier, and the owner of any such land or premises, and his place of abode or that of his agent is known to the vestry or board by or on behalf of whom such notice is given, or any of their officers, such notice shall be served on such owner personally, or left with some inmate of his place of abode, or transmitted to such owner through the post office, addressed to him at his place of abode or last known place of abode in the United Kingdom, or served on his agent as aforesaid.

224. Tender of amends before action.]—If any party have committed any irregularity, trespass, or other wrongful proceeding in the execution of this Act, or any Act incorporated therewith, or by virtue of any power or authority given by this Act or such other Act as aforesaid, and if before action brought in respect thereof such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action. (y)

225. Damage, expenses, and compensation, how to be ascertained and recovered.]—In every case where

the amount of any damage, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, or

the amount of any damage, costs, or expenses is by this Act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for,

such amount shall, in case of dispute, be ascertained and determined by and shall be recovered before two justices; and the amount of any compensation (z) to be made under this Act by the said [London County Council], or any vestry or district board, shall, unless herein otherwise provided, be settled, in case of dispute, by and shall be recovered before two justices, unless the amount of compensation claimed exceed fifty pounds, in which case the amount thereof shall be settled by arbitration, according to the provisions contained in the Lands Clauses Consolidation Act, 1845, which are applicable where questions of disputed compensation are authorised or required to be settled by arbitration. (a)

226. Method of proceeding before justices in questions of damages, etc.]—Where the amount of any compensation, or of any damage, costs, or expenses, is to be determined by or to be recovered before two justices, it shall be lawful for any justice, upon the application of either party, to summon the other party to appear before two justices, at a time and place to be named in such summons; and upon the appearance of such parties, or, in the absence of either of them, upon proof of due service of the summons, it shall be lawful for such two justices to hear and determine the matter, and for that purpose to examine such parties, or any of them,

(x) See *A.-G. v. Aston L. Bd.*, 22 Ch. D. 221, followed in *Brown v. Mayor, etc., of Dunstable* (1899), 2 Ch. 374.

(y) See Public Authorities Protection Act, 1893, as to limitation of actions against local authorities.

(z) See ss. 69, 81, and 120, as to vestries and district boards; and s. 135, as to the County Council.

(a) See ss. 25 to 37 of 8 Vict. c. 18.

and their witnesses, on oath, and make such order, as well as to costs as otherwise, as to them may seem just.

227. Recovery of penalties. 11 & 12 Vict. c. 43.]—Every penalty of forfeiture imposed by this Act, or by any byelaw made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceedings before any justice in manner provided by the 11 & 12 Vict. c. 43, "to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders." (b)

228. Damages to be made good in addition to penalty.—If, through any act, neglect, or default on account whereof any person has incurred any penalty imposed by this Act, any damage to the property of the said [*London County Council*], or any vestry or district board, has been committed by such person, he shall be liable to make good such damage, as well as to pay such penalty; and the amount of such damage, in case of dispute, shall be determined by the justices by whom the party incurring such penalty is convicted, and the payment of the amount of such damage may be enforced in all respects as such penalty.

229. Transient offenders.—It shall be lawful for any officer or servant of the said [*London County Council*], or any vestry or district board, and for any police constable, and all persons called by him to his assistance, to seize and detain any person who has committed any offence against the provisions of this Act, or any byelaw made in pursuance thereof, and whose name and residence shall be unknown to such officer or servant or police constable, and convey him with all convenient despatch before some justice, without any warrant or other authority than this Act; and such justice shall proceed with all convenient despatch, to the hearing and determining of the complaint against such offender.

230. [Proceedings not to be quashed for want of form.] (c)

231. Parties allowed to appeal to quarter sessions on giving security.—If any person feel aggrieved by any adjudication or determination of any justice or justices with respect to any penalty or forfeiture under the provisions of this Act, such party may appeal to the general or quarter sessions; but no such appeal shall be entertained unless it be made within four months next after the making such determination or adjudication, nor unless ten days' notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal is brought, nor unless the appellant forthwith, after such notice, enter into recognizances, with two sureties, before two justices, conditioned duly to prosecute such appeal, and to abide the order of the court thereon. (d)

232. Court to make such order as they think reasonable.—At the general or quarter sessions for which such notice is given the court shall proceed to hear and determine the appeal in a summary way, or they may, if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal the court may, if they think fit, mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid to the appellant, or levied by distress upon his goods, to be returned to him, and may also order such further satisfaction to be made to the party injured as they may judge reasonable, and they may make such

(b) This provision is by s. 104 of the Met. Man. Act, 1862, extended to recovery of any damages, costs, or expenses, the recovery whereof is not otherwise provided for. And see the London Building Act, 1894, s. 200, *ante*.

(c) See *R. v. Wood*, 5 E. & B. 49; *R. v. Dickenson*, 7 E. & Bl. 831; *R. v. Metropolitan Bd. of W.*, 8 E. & Bl. 529; *R. v. Broughton Bd. of Health*, 12 L. T. 310.

(d) The order of a justice directing the demolition of a building under s. 75 of the Act of 1862 is not an adjudication "with respect to a penalty or forfeiture" within the above section, and therefore no appeal to quarter sessions would lie against the order. *R. v. Justices of Middlesex*, 9 Q. B. D. 41. See *R. v. Barnet Rural Sanitary Authority*, 1 Q. B. D. 558.

order concerning the costs, both of the adjudication and of the appeal, as they may think reasonable. (c)

[Ss. 233 and 234 are repealed by ss. 107 and 105 of the *Met. Man. Act*, 1862.]

INTERPRETATION OF ACT (f).

250. Interpretation of terms: "*the metropolis*:"—In the construction of this Act "*the metropolis*" shall be deemed to include the City of London, and the parishes and places mentioned in the schedules (A), (B), and (C) to this Act: (g)

"*the City of London*:"—"the City of London" shall be deemed to include all parts now within the jurisdiction of the Commissioners of Sewers for the City of London: and

"*Parish*:"—the word "*parish*" shall include any place mentioned in schedule (A) to this Act, and any place or combination of places mentioned in schedule (B) to this Act, for which one or more member or members is or are to be elected to any district board;

"*Overseers of the poor*:"—the expression "*the overseers of the poor*" shall include any persons authorised to make and collect or cause to be collected the rate for the relief of the poor in any parish;

any expression referring to any rate or rates raised under this Act by the *London County Council*] or any vestry or district board shall mean the sums and rates authorised to be raised by the said [*County Council*] and the sums authorised to be raised by any vestry and district board respectively;

"*Owner*:"—the word "*owner*" (h), shall, except for the purpose of the provision of this Act requiring notice to be served on owners or reputed owners of land, before application to one of Her Majesty's principal Secretaries of State for his consent to exercise powers of taking land, or any right or easement in or over land, compulsorily, (i) mean the person for the time being receiving the rackrent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent (k);

"*Street*:"—the word "*street*" (l) shall apply to and include any highway (except the carriageway of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare

(c) Repealed from the words "*or they may confirm*" to the end of the section by 47 & 48 Vict. c. 43.

(f) See Interpretation of terms in s. 5 of the *London Building Act*, 1894; in s. 112 of the *Met. Man. Act*, 1862, *post*, and in s. 4 of the *Public Health Act*, 1875, *post*.

(g) See 1. G. v. 1. C. = *L. H.*, 22 Ch. D. 221.

(h) The trustees of a Nonconformist chapel were held to be "*owners*" within this section. *Hughes v. Loe*, 16 Q. B. D. 379. As to a tenant for life, see *Leam v. Crawley*, 28 Ch. D. 431. See, too, as to persons who are "*owners*," *Hobbs v. Kensington Vestry*, 1. R. 2 C. P. 265, *ante*, p. 40; *Leam v. Driscoll* in *Driscoll v. Victoria Brewery* (1903), 1 K. B. 881; *London School Bd. v. St. Mary, Islington*, 1. R. 1 Q. B. D. 65; *Plumstead Bd. v. British Land Co.*, 1. R. 10 Q. B. 23, and other cases cited in the notes to s. 111 of the *Public Health (London) Act*, 1861, *post*; and in the notes to ss. 3 and 130 of the *Public Health Act*, 1875, *post*. *Fulham Vestry v. Mayor* (1901), 1 Q. B. 501; overruled in *L. C. C. v. Mayor of Wandsworth* (1902), 1 K. B. 797.

(i) See s. 142.

(k) Where the plaintiff having a strip of land 1 inches wide and 265 feet long, abutting on the north side of a new street, had erected a boundary fence upon the land along its whole length, in pursuance of a covenant with his vendor who owned an adjoining strip, it was held that he was "*owner*" of the strip within the meaning of this section, and therefore liable to contribute towards the expenses of paving the new street. *Harrison v. Westminster Bd.*, 43 W. R. 13 Q. B. D. 211, followed in *St. John's Property Corporation, Ltd. v. Mayor*, July 24, 1904, p. 183. Where a house abuts the premises at the same rent as he was liable for to his landlord, and, though collecting the rent from the subtenant, pays it over to his own landlord, and derives no benefit or profit therefrom himself, he is not "*owner*." *Hughes v. Halsey*, 41. of W., 43 W. R. 119.

See *Leam v. Mile End and Tower Vestry*, 27 1. J. Q. B. 208; *St. John, Hampstead (Vestry) v. Hampel*, 15 Q. B. D. 652; and see s. 119, *ante*, *London Building Act*, s. 5; *L. C. C. v. Mather*, 61 1. J. M. C. 101; *St. John v. Loe*, 65 J. P. 329. See p. 476, *ante*.

or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage; (*m*)

"*Drain*:"—the word "drain" shall mean and include any drain of and used for the drainage of one building only, (*n*) or premises within the same curtilage, (*n*) and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation (*o*) under the order of any vestry or district board; (*p*) and

"*Sewers*:"—the word "sewer" shall mean and include sewers and drains of every description, except drains to which the word "drain," interpreted as aforesaid, applies; and

"*Ashpit*:"—the word "ashpit" shall include "dustbin."

251. This Act shall commence and come into operation, save as herein otherwise provided, on the first day of January, 1856.

(*m*) See ss. 105, 106, *ante*.

(*n*) As to an arcade, such as the Lowther Arcade, see *St. Martin-in-the-Fields v. Bird* (1895), 1 Q. B. 428; *Pilbrow v. St. Leonard's, Shoreditch* (1895), 1 Q. B. 433; *Appleyard v. Lambeth Vestry* (1897), 66 L. J. Q. B. 347. In *Holland v. Lazarus* (1897), 66 L. J. Q. B. 285; 61 J. P. 262, a rain-water pipe was held to be a drain. This case was approved in *Silles v. Fulham Borough Council* (1903), 1 K. B. 829. See also *Heaver v. Fulham Corporation* (1904), 2 K. B. 383. See also *Geen v. Newington Vestry* (1898), 2 Q. B. 1; *Gorringe v. Shoreditch Borough*, 66 J. P. 565.

(*o*) As to the meaning of "combined operation," see *St. Matthew, Bethnal Green (Vestry) v. London School Bd.* (1898), A. C. 1190.

(*p*) See s. 112 of the Met. Man. Act, 1862, as to the word "drain." And see *Kershaw v. Taylor*, [1895] 2 Q. B. 208.

AN ACT TO AMEND THE METROPOLIS LOCAL
MANAGEMENT ACTS

25 & 26 Vict. c. 102.

[7th August, 1862.]

44. *Owners and occupiers of land may execute works of drainage at their own expense.*—It shall be lawful for the owners or occupiers of any land or premises in any parish, district, or part within the limits of the metropolis as defined by the firstly recited Act, (a) with the consent and subject to the regulations and conditions hereinafter mentioned, to construct sewers at their own expense for the purpose of draining such land or premises; and it shall be lawful for any vestry or district board in whom the sewers in any parish, district, or part are vested, if they shall deem it just and proper so to do, to contribute out of the rates under their control applicable to the execution of works of sewerage to the costs of any sewers constructed for the purpose aforesaid. (b)

47. *Private parties before branching sewers into main or district sewers to apply for sanction of vestries, &c.*—Every person other than a vestry or district board intending to make or branch a sewer, either into a sewer vested in the [London County Council], or into a sewer vested in any vestry or district board, shall in the first instance lay the plan and section thereof before, and apply for the sanction of, the vestry or district board of the parish, district, or part in which such last-mentioned sewers shall be situate; and no sewer shall be begun to be made by such person until the sanction in writing of such vestry or district board shall have been obtained. (c)

49. *Seven days' notice must be given before drains can be branched into main sewers.*—All persons intending to make or branch any drain into a sewer vested in the [London County Council] shall, seven clear days before commencing any works for that purpose, make written application to the vestry or board of the parish, district, or part in which such sewer shall be situate, accompanied by a plan showing such particulars as may be required by any byelaw or resolution of the said [County Council]; and no such work shall be commenced until the sanction in writing of the said vestry or district board shall have been given.

50. *Regulations as to abandonment, alterations, &c., of designs for sewers previously approved.*—When it shall be desired to abandon either wholly or in part, or to extend, contract, or alter, any design for a sewer previously submitted to and approved by the [London County Council], notice in writing of such desire shall be given by the vestry or district board by whom such approval shall have been obtained to the said [County Council], accompanied by plans and sections showing the nature of the abandonment, extension, contraction, or alteration desired; and

(a) I.e. the Act of 1855, *supra*.

(b) The power here given to vestries and district boards is a useful one where land has been newly let for building operations.

(c) Ss. 45 and 46 require the submission of proper plans and particulars before the construction of sewers can be sanctioned. By these regulations all applications from private parties in the first place come before the local board, and they then communicate with the County Council; see the provisions of s. 60 of the Met. Man. Act, 1865, *ante*, and see *R. v. Greenock & Ald. of W.*, 1 C. & F. 236.

By s. 51, if the sewer be not constructed within twelve months, a fresh application must be made.

no such abandonment, extension, contraction, or alteration shall be made without the previous approval in writing of the said [*County Council*]; and

no person other than a vestry or district board shall abandon wholly or in part, or extend, contract, or alter in construction, any sewer approved or sanctioned by the [*London County Council*], without the previous sanction in writing of the vestry or district board in whose parish or district the works were intended to be executed, to be applied for and given in the same manner as hereinbefore directed with respect to new sewers.

52. *Expense of constructing sewers in new streets and streets laid out since Jan. 1, 1856.*—Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in or for the drainage

of any new street, (*d*) or

of any house or houses erected since the first day of January, 1856,

the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners (*e*) of such street or houses and of the land bounding or abutting on such street respectively, and

the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just, (*f*) and

the amount charged upon or payable in respect of each house or premises shall be payable before the works shall be commenced, during their progress, or after their completion, as the vestry or district board shall in each case determine, either in one sum or by instalments, within such period, not exceeding twenty years, as the vestry or district board shall direct; and

any such sum or instalments shall be recoverable from the present or any future owner of the said house or premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board. (*g*)

53. *Expense of constructing sewers where there had before been only open sewers.*—Where any sewer shall be constructed by any vestry or district board in a street (*h*) in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and

the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in their parish or district; and

the amount so charged by the vestry or district board upon or in respect of

(*d*) This includes a new street in the popular sense of the term, as where, for instance, a country lane is built upon at both sides: *Pound v. Plumstead Bd. of W.* (1871), L. R. 7 Q. B. 183, and see *Clerkenwell Vestry v. Edmondson* (1902), 2 K. B. 336.

(*e*) See s. 250 of the Met. Man. Act, 1855, *ante*, for definition of "owner," and s. 110 of this Act, *post*, by which these Acts are to be construed as one Act. See s. 5 of the Building Act, 1894, and notes thereto as to "owner." See also s. 105 of the Met. Man. Act, 1855, *ante*.

(*f*) The authority appears to have absolute discretion as to the principle of making the apportionment provided they act *bonâ fide*: *Met. Dist. Ry. Co. v. Fulham Vestry* (1895), 2 Q. B. 443.

(*g*) As to limitation of time for proceedings, see *Tottenham L. Bd. v. Rowell*, L. R. 1 Ex. D. 514: *ib.*, 15 Ch. D. 378.

(*h*) The word "street" includes a "new street" as defined by s. 112. *St. John, Hampstead (Vestry) v. Cotton*, 12 A. C. 1; and see *Sheffield v. Fulham Dist. Bd.*, L. R. 1 Ex. D. 395: and *Fulham Dist. Bd. v. Goodwin*, *ib.*, 400.

As to the limit of time for apportionment, see *Bradley v. Greenwich Dist. Bd.*, L. R. 3 Q. B. D. 384.

each house or premises shall be payable, either before the work shall be commenced, during their progress, or after their completion, as the vestry or board shall in each case determine, either in one sum or by instalments within such period, not exceeding twenty years, as the vestry or board shall direct; and

any such sum or instalment shall be recoverable from the present or any future owner of such house or premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board:

Provided that no rate or property in respect of which sewers rates have been levied for five years prior to the first day of January, 1856, shall be subject to be charged under the provision contained in this section.

54. Land may be charged in a less proportion than house property.—In apportioning the cost of constructing sewers under the provisions contained in the two last preceding sections of this Act relating to the construction of sewers wholly or partly at the cost of private parties, it shall be lawful for any vestry or district board to charge the owners of land bounding or abutting on any street in a less proportion than the owners of house property, should they, under the circumstances of the case, deem it just and expedient so to do.

55. Where estimated expenses exceed actual costs, difference to be refunded by, and where less to be paid to, vestry, etc.]—In any case in which the estimated expenses shall exceed the actual cost of constructing sewers under the provisions contained in the said two preceding sections of this Act relating to the construction of sewers wholly or partly at the cost of private parties, then the difference between such estimated expense and the actual cost shall be repaid by the vestry or board to the owners of the houses or premises by whom the amount of any such estimated expense may have been paid; and

in any case in which the estimated expenses shall be less than the actual cost of constructing any sewer or sewers under the provisions aforesaid, then the owners of the said houses or premises shall, on demand, pay to the said vestry or board such further sum of money as, together with any sums already paid, will make up the amount of the actual cost; and

the vestry or district board shall have all the same remedies for the recovery of such further sum as are hereinbefore given for recovering any expenses apportioned by vestries or district boards under the said enactments.

56. Vestry or district board may defray part of expense out of sewer rates.]—It shall be lawful for the vestry or district board, should they deem it reasonable and just so to do, at their discretion to defray, out of the sewers rates to be levied in their parish or district, any portion of the expenses of and incident to the construction of sewers under the provisions contained in the said two sections of this Act relating to the construction of sewers wholly or partly at the cost of private parties.

57. [Appeal against orders of vestries, etc., as to amount or apportionment of expense to County Council.]

58. Contribution to cost of main sewers and sewers built since Jan. 1, 1856, or hereafter to be built.]—The provisions contained in s. 80 of the firstly recited Act, empowering vestries and district boards to order, at their discretion, under the circumstances therein mentioned, such sums as they shall deem just to be paid and contributed by the owners of houses towards the expense of the construction of sewers into which drains from such houses shall be made or branched, shall be extended, and the same are hereby extended and made applicable to

the [London County Council] with respect to houses draining into main sewers constructed at the expense of any person or body other than any commissioners of sewers, and which are vested in the [County Council]; and the same provisions are hereby extended and made applicable to

all sewers within the limits of the metropolis as defined by the firstly recited Act, built since the first day of January, 1856, or which may hereafter be built at the

expense of any person or body other than the [*London County Council*], or any vestry, district board, or other body having control over sewers within the metropolis, into which house drains may be made or branched; and

the said [*County Council*], vestry, district board, or other body, as the case may be, may at their discretion accept payment of contribution from the owners of houses draining into such sewers respectively, either in one sum or by instalments within any period not exceeding twenty years, with interest after a rate not exceeding five pounds by the hundred by the year, as the said board, vestry, or other body shall in each case determine, and shall on receipt of any such contribution or instalment pay over the same to the person or body entitled thereto; and

every sum payable to the said board, vestry, or other body by way of contribution to the construction of sewers shall be recoverable from the present or any future owner of the said premises either by action at law or before a justice of the peace in a summary manner, at the option of the board or vestry:

Provided that nothing herein contained shall prejudice or affect the right of vestries and district boards to demand and recover from the owners of houses and land the sums charged upon them by such vestry and district boards respectively under the provisions contained in this Act. (i)

61. *Regulations respecting openings into sewers.*—S. 77 of the firstly recited Act is hereby repealed; and in lieu thereof be it enacted: That no person shall

make or branch any sewer or drain, or

make any opening into any sewer vested in the [*London County Council*], or in any vestry or district board, without the previous consent in writing of such board or vestry: (k)

Provided that it shall be lawful for any person, (l) with such consent, at his own expense, to make or branch any drain into any sewer vested in such board or vestry, or authorised to be made by them or either of them under the firstly recited Act or this Act, such drain being of such size, materials, and other conditions, and branched into such sewer in such manner and form of communication in all respects, as the board or vestry shall direct or appoint: (m)

Provided also, that where any contribution to the cost of a sewer is payable in respect of drainage into the same, it shall not be lawful for any person to make or branch any drain into such sewer except in conformity with the directions of the board or vestry in whom the same shall be vested with respect to payment of contribution under the provisions contained in the firstly recited Act and this Act in that behalf; (n) and

in case any person, without the consent of the said [*County Council*], district board, or vestry as aforesaid, make or branch, or cause to be made or branched, any sewer or drain, or make any opening into any of the sewers vested in any such board or vestry, or authorised to be made by them as aforesaid, or if any person make or branch, or cause to be made or branched, any drain of a different construction, size, material, or other conditions, or in another manner or form of communication than shall be directed or appointed by such board or vestry, every person so offending shall for every such offence forfeit a sum not exceeding fifty pounds; and

the board or vestry may cut off the connection between such drain and their sewer, or if they shall see fit execute the necessary works for making the said drain

(i) This section extends the provisions of s. 80 of the Met. Man. Act, 1855, *ante*, and authorises contribution to the cost of main sewers built at the expense of private parties, and of all sewers built since January 1, 1856, or hereafter to be built by private parties.

(k) See *R. v. Greenwich Bd. of W.*, 1 C. & E. 236.

(l) The words "any person," in this section, mean any person entitled to the benefits of the Act, and are therefore limited to owners and occupiers within the metropolitan area: *Metropolitan Bd. of W. v. L. and N.-W. Ry. Co.*, L. R. 17 Ch. D. 246. See this case generally as to this section, and the power of the County Council where new houses are built outside the metropolitan area, and as to sewage from additional houses. See s. 21 of the Public Health Act, 1875, *post*.

(m) See s. 76 of the Met. Man. Act, 1855, *ante*, and cases there cited.

(n) See s. 59, *supra*, and see s. 80 of the Met. Man. Act, 1855, *ante*.

conformable to their regulation or direction at the expense of the person making such drain or causing the same to be made, such expenses to be recovered either by action at law or in a summary manner before a justice of the peace, at the option of the board or vestry.

63. Extension of time under s. 76 of 18 & 19 Vict. c. 120, for making orders by vestries and district boards.]—Whereas by s. 76 of the firstly recited Act it is provided that the vestry or district board shall make their order in relation to the matters therein referred to, and cause the same to be notified to the person from whom the notice mentioned in the said section was received within seven days after the receipt of such notice, and it is expedient that the time for making such order should be extended: Be it therefore enacted, that

where any notice shall have been given to any vestry or district board pursuant to the said section, it shall be lawful for the surveyor of such vestry or board, if he shall deem it necessary and proper so to do, within three days after the receipt of such notice by the vestry or district board, by writing under his hand directed to and served upon the person giving such notice, to require that the building or works referred to therein shall not be proceeded with until after the then next meeting of the said vestry or district board, and until their directions in reference thereto shall have been notified to such person, provided that the order of the said vestry or district board shall be made and notified to the said person at the latest within fifteen days after the receipt of such notice by the vestry or district board; and

in case any person shall proceed with any building or works contrary to this enactment he shall forfeit and pay to the vestry or district board a sum not exceeding five pounds, and also a further sum of forty shillings for every day during which such offence shall continue, to be recovered by action at law or in a summary manner at the option of the vestry or board.

64. [Where parties neglect to carry out works pursuant to order of vestry, the vestry may recover penalty or do the works.] (o)

65. Penalties in 18 & 19 Vict. c. 120 extended to persons causing offences.]—The penalties declared by the firstly recited Act in the case of persons committing the offences mentioned therein are hereby extended and made applicable to all persons causing the commission of any such offences, or by whose order or direction any such offences shall have been committed. (p)

66. Temporary provision for drainage of property where no proper sewer within 200 feet.]—Whereas certain property within the limits of the metropolis is so situate as to render it impracticable, or practicable only at undue expense, to connect such property with covered sewers, and it is expedient that some temporary provision should be made for draining such property and abating the nuisances existing thereon or caused thereby: Be it therefore enacted, that

in any case in which any house or other building, whether erected before or after the passing of this Act, is without sufficient drainage, and there is no proper sewer within two hundred feet of any part of such house or building, it shall be lawful for the vestry or district board of the parish or district in which such house or building is situate by notice in writing to require the owner of such house or building to construct and lay from such house or building a covered drain to lead therefrom into a covered watertight cesspool or tank or other suitable receptacle, not being under a house or within such distance from a house as the vestry or board shall direct, and to construct such cesspool, tank, or receptacle; and the several provisions in the firstly recited Act with respect to the laying of house drains at the expense of the owners of property, and the recovery of such expenses of and the penalties for any omission in respect to the performance of any such works pursuant to the orders of

(o) Partially repealed by Public Health (London) Act, 1891, *post*, p. 609. See *S. S. James v. Jones, Coker and Vestry v. Henry*, 21 Q. B. D. 701.

(p) See s. 83 of the Act of 1862, *ante*. See Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 44), s. 5.

vestries or district boards in accordance with the directions of the said Act, shall be extended to and apply to the making of such cesspools, tanks, receptacles, and drains, and the orders of vestries and district boards in relation thereto and the expenses thereof. (g)

68. Penalty on persons placing buildings or encroachments on sewers.—Every person who shall knowingly erect or place any building, wall, bridge, fence, obstruction, annoyance, or encroachment in, upon, over, or under any sewer (r) under the jurisdiction of the [London County Council], or of any vestry or district board, and

every person obstructing, filling in, or diverting any sewer or drain under the jurisdiction, survey, or control of the [County Council], or of any vestry or district board, without the previous consent in writing of the board or vestry in whom the same may be vested, shall, in addition to any other proceeding to which he may be liable therefor, forfeit and pay to such respective board or vestry a sum not exceeding twenty pounds for every such offence; and

the board or vestry may demolish and remove any such building, wall, bridge, fence, obstruction, annoyance, or encroachment, and perform any works necessary for restoring or reinstating the sewer or other work or thing damaged; and

the party erecting such building, wall, bridge, fence, or causing such obstruction, annoyance, or encroachment, shall also pay the expense of removing and abating them respectively, and of reopening, restoring, repairing, or reinstating any sewer or drain obstructed, filled in, closed up, or diverted; and

in case of a continuing offence in any of the cases aforesaid the offender shall be liable to a further penalty, not exceeding five pounds, for each day after notice thereof from the [London County Council], or from the vestry or district board, to be recovered by action at law or before any justice of the peace, by a summary proceeding, at the option of the board or vestry;

Provided always, that nothing herein contained shall extend to prevent or impede the maintenance, repair, or renewal of any buildings or works under which a sewer or drain has been constructed, but so, nevertheless, that such buildings or works shall not injure or obstruct the said sewer or drain.

69. Penalty on persons interfering with sewers.—Any person who shall take up, remove, demolish, or otherwise interfere with any sewer or part of a sewer vested in the [London County Council], or in any vestry or district board, without the previous permission in writing of such board or vestry, or who shall wilfully damage any sewer, bank, defence, wall, penstock, grating, gully, side entrance, tide valve, flap, work, or thing vested in the [County Council] or any vestry or district board, or do any act by which the drainage of the metropolis or any part thereof may be obstructed or injured, shall for every such offence forfeit and pay to the said [County Council], or to the vestry or district board aggrieved by any such act, for every such offence (t) a sum not exceeding twenty pounds, and shall also pay to such board or vestry all the expenses of repairing, restoring, reinstating, or amending any sewer or other work or thing so taken up, removed, demolished, damaged, or interfered with, to be recovered by action at law or before a justice of the peace by a summary proceeding, at the option of the board or vestry.

73. Act as to paving and improving parts of metropolis to extend to metropolis as defined by this Act.—The powers of improving and regulating streets and for the

(g) This section relates to houses, whether built before or after the Act. S. 75 of the Met. Man. Act, 1855, *ante*, by which no house is to be built without drains constructed to the satisfaction of the vestry or board, is limited to houses built after the passing of that Act.

(r) See s. 250 of the Met. Man. Act, 1855, *ante*, for definition of "sewer;" and see s. 204 of that Act, *ante*. See also note to the word "sewer" in the proviso to s. 69 of the Act of 1855, *ante*.

As to the right of the County Council to lateral support of their sewers, see *Metropolitan Bd. v. Metropolitan Ry. Co.*, L. R. 4 C. P. 192. See *ante*, Chap. XXV., as to right of support at law.

(t) See s. 102, *post*.

provision of nuisances contained in the 57 Geo. III. c. 29, local and personal, intitled "An Act for better paving, improving, and regulating the Streets of the Metropolis, and removing and preventing Nuisances and Obstructions therein," shall, so far as the same is in force, and is not inconsistent with the provisions of the recited Acts and this Act, extend and apply to the metropolis as defined in the firstly recited Act and in this Act, including any unpaved streets, and notwithstanding any exceptions therein contained. (u)

77. *Expenses of paving new streets.*—Where any vestry or district board shall, under the powers given by s. 156 of the firstly recited Act, (x) have paved or be about to pave any new street, (x) the owner of the land (y) bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein,

provided that it shall be lawful for the vestry or district board to charge z the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and

any such costs or expenses, including the cost of paving at the points of intersection of streets, (a) and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and

it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board. (b)

(u) This Act (57 Geo. III. c. 29), the General Metropolis Paving Act (usually known as Michael Angelo Taylor's Act), extended to all streets and public places which were at the time of its passing paved or might be thereafter paved within the cities of London and Westminster, and borough of Southwark, and any other parts of the metropolis which were included within the weekly bill of mortality, and to all streets and public places which were then paved, or might thereafter be paved, within the parishes of St. Pancras and St. Mary-lebone, except only certain parts particularly excepted. See *Brinkley v. St. Mary, Battersea*, 2 Q. B. D. 486; *Wishart v. London Joint Stock Bank*, Ltd., 67 J. P. 289.

(x) *I.e.*, the Act of 1855, *ante*.

(y) See s. 112 for the definitions of "pave" and "new street," *post*; and see cases under s. 150 of the Public Health Act, 1875, as to the finding of fact by the justices that a road is a new street, *post*.

(z) See the notes and cases cited under s. 105 of the Met. Man. Act, 1855, *ante*, which section only includes "the owners of houses."

A cemetery company are "owners of land" and liable. *St. Giles, Camberwell (Vestry) v. London Cemetery Co.*, [1894] 1 Q. B. 639. See also *Great Eastern Ry. Co. v. Hackney Rd. of W.*, L. R. 8 Ap. Ca. 687; *Battersea Vestry v. Palmer* (1897), 66 L. J. Q. B. 77; *Easton v. Hampstead (Municipal)* (1905), 69 J. P. 434.

As to the liability for paving expenses of the owner of a strip of land 4 inches wide and 265 feet in length, upon which a fence had been erected in pursuance of a covenant with the vendor to erect and maintain such a fence upon it, see *Williams v. Wandsworth Bd. of W.*, L. R. 13 Q. B. D. 211.

(a) The apportionment need not be made on a uniform principle, but may be at a higher rate as to one piece of land than another; *Stokes v. St. Giles, Camberwell*, 67 L. J. M. C. 111.

(b) The words "points of intersection" of streets are not limited to the cutting or crossing of at least two streets, but also apply where street A runs into street B so as to form a T: *Druggitt v. Wandsworth (Municipal)* (1895), 69 J. P. 394.

(c) The apportionment is not binding and conclusive for all purposes. Upon the hearing of a summons evidence may be given by the owner to shew that the amount alleged to have been expended has not been actually expended; or that it includes expenses other than paving expenses: *H. v. Marsham*, [1892] 1 Q. B. 371; and see *Strand v. Wandsworth Dist. Bd. of W.*, [1894] 2 Q. B. 1. A municipality lies to compel the reception of such evidence: *ibid.*

The Court will consider the question whether an apportionment of expenses of paving is made upon the right people, including all liable: *Fish v. Hampstead (Municipal)* (1905), 69 J. P. 434.

As to time within which a summary proceeding must be taken, see *French v. Nicholas*, 60

80. (c) *Proviso to s. 106 of 18 & 19 Vict. c. 120 repealed.*—The proviso of s. 106 of the firstly recited Act is hereby repealed; and in lieu thereof be it enacted,

That no street not being a highway shall be repaired as in the said section mentioned, unless notice be given to the owners (d) and rated occupiers of the houses in such street respectively; and service of any such notice may be effected by leaving the same at the several houses in such street, or where any of the said houses shall be unoccupied, by affixing the same upon the outer door or some conspicuous part of such houses; and

Notice of intention to repair street not being a highway.—provided further, that no such street shall be repaired as in the said section mentioned if within one month after notice has been given as aforesaid written notice of objection to such repair, signed by at least two-thirds of the owners or rated occupiers of houses in the said street, shall be given to the vestry or district board.

81. *Where owners of courts, etc., omit to drain and pave, vestry or district board may perform the works, charging expenses to owner.*—In any case of default by the owner of any court, passage, or public place, not being a thoroughfare, to comply with the requisition of any vestry or district board to perform works of paving or draining of the nature described in s. 100 of the firstly recited Act, it shall be lawful for the vestry or board, should they see fit, in lieu of enforcing the penalty therein mentioned, to execute and perform such works, and recover the expenses thereof from the owner either by action at law or in a summary manner before a justice, at the option of the vestry or board.

83. *County Council may make byelaws for guidance of vestries, etc., in construction of sewers.*—The [London County Council] may, in order to secure the efficient maintenance of the main and general sewerage of the metropolis, from time to time make, alter, and repeal byelaws

for the guidance, direction, and control of the vestries of parishes in schedule A to the firstly recited Act, district boards, and all other persons, in relation to the levels, dimensions, construction, maintenance, ventilation, and cleansing of sewers in their respective parishes, districts, or parts, and

for the other objects enumerated in s. 138 of the firstly recited Act, subject in all respects to the several provisions relating to byelaws contained in s. 202 of the said Act; but this provision shall only extend to the City of London and the liberties thereof, so far as regards the main drainage of the metropolis. (e)

88. *Persons omitting to give notice required by s. 76 of 18 & 19 Vict. c. 120 liable to penalty.*—If any person shall, without having given the notice directed by s. 76 of the firstly recited Act, begin to lay the foundation of any new house or building within any parish mentioned in schedule A of the said Act, or any district in schedule B of the said Act, or to make any drain for the purpose of draining either directly or indirectly into any sewer under the jurisdiction of the vestry or board of such parish or district, he shall become liable to a penalty for every such offence not exceeding £5, and to a continuing penalty of 40s. for each and every day during which he shall omit to give the notice directed by the said Act. (f)

L. T. 553; 53 J. P. 597; 5 T. L. R. 276; but the principle on which the expenses have been apportioned cannot be questioned. *Davis v. Greenwich Bd. of W.*, [1895] 2 Q. B. 219. The borough council, apparently, have power to rescind an old and make a new apportionment: *Bishop v. Wandsworth District Bd. of W.* (1900), 69 L. J. Q. B. 682.

The expenses are not a charge on the property: *Egg v. Blayney*, 21 Q. B. D. 107. As to liability as between vendor and purchaser, see same case. As to flagging footpaths, see *Metropolis Management Act, 1862, Amendment Act, 1890, post*, p. 604.

(c) As to repair of a road or way not being a street, see *Metropolis Management Amendment Act, 1890, s. 3, post*, p. 604.

(d) See s. 250 of 18 & 19 Vict. c. 120 for definition of word "owner," *ante*, p. 589; see also the cases cited under s. 5 of the *London Building Act, 1894, ante*.

(e) See s. 202 of the *Met. Man. Act, 1855, ante*, which only refers to the pipes, drains, and other means of communicating with sewers, and not to the construction of sewers.

(f) See s. 164 of the *Building Act, 1894, ante*. See the *London County Council Bye-laws, post*, p. 641. See *Poplar District Bd. of W. v. Knight*, 28 L. J. M. C. 57.

90. Vestry or district board may require payment of costs or expenses from owner or occupier, and occupier paying to deduct from rent.] Sections 217, 218, and 219 of the firstly recited Act are hereby repealed; and in lieu thereof be it enacted, that

it shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act or this Act either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by the recited Act and this Act; and

the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of such rent:

Provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent (g) without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable, but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier: (h)

Agreements between landlord and tenant not to be affected.]—Provided also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property, whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant. (i)

97. Deduction by owner paying rent where amount of expenses deducted from rent paid to him.]—If the owner or landlord of any premises from whose rent any amount shall be deducted in respect of any costs, charges, or expenses payable under the firstly recited Act or this Act shall hold the premises in respect of which the amount of such costs, charges, or expenses shall be paid at a rent not less than the rackrent.

He shall be entitled to deduct the whole amount paid by him on account of such costs, charges, or expenses from the rent payable by him to his superior landlord; and

if he holds at a rent less than the rackrent, he shall be entitled to deduct from the rent so payable by him a sum bearing the same proportion to the amount so paid by him on account of such costs, charges, or expenses as his rent shall bear to the rackrent; and

if the owner or landlord from whose rent any deduction be made under the provision last aforesaid be himself liable to the payment of rent for the premises in respect of which the deduction shall be made, and hold such premises for a term of which less than twenty-one years shall be unexpired, but not otherwise, he may deduct from the rent so payable by him a sum bearing the same proportion to the sum deducted from the rent payable to him as the rent payable by him shall bear

(g) The money must have been actually paid: *Ryan v. Thompson*, L. R. 3 C. P. 441. See *Hermisteady Vestry v. Ramsey*, L. R. 6 C. P. 267. The expenses of remedying sanitary conditions of premises can be deducted: *Home and Colonial Stores v. Todd*, 63 L. T. 829.

A payment made by a tenant to a local authority under this section is not a payment of or on account of rent, but a payment of or on account of expenses; and where a tenant has covenanted with his landlord that he will bear the expenses which he has under s. 96 paid to the local authority, he has no right, by reason of the proviso, to deduct from the rent the amount which he has so paid, and the landlord's right to distrain for unpaid rent is unaffected: *Skinner v. Hunt* (1904), 2 K. B. 462.

(h) Compare the Building Act, 1894, s. 173, *ante*.

(i) *Re Robertson and Thorne*, 47 J. P. 566; *Alum v. Dickinson*, 9 Q. B. D. 632; *Widdinson v. Cooper*, 13 Q. B. D. 1; *Widdrige v. Fenne*, 17 Q. B. D. 212.

See a similar provision in s. 101 of the Public Health Act, 1875.

to the rent payable to him, and so on in succession with respect to every landlord of the same premises both receiving and liable to pay rent in respect thereof, and holding the same for a term of which less than twenty-one years shall be unexpired as aforesaid :

Provided always, that nothing herein contained shall be construed to entitle any person to deduct from the rent payable by him more than the whole sum deducted from the rent payable to him :

Provided also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner or occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant.

102. *Penalties may be recovered in manner provided by 11 & 12 Vict. c. 43.*—Every penalty or forfeiture imposed by this Act, and made recoverable by a summary proceeding, may be recovered before any justice of the peace in manner provided by the 11 & 12 Vict. c. 43. (k)

107. *Penalties to be proceeded for within six months.*—Section 233 of the firstly recited Act is hereby repealed; and in lieu thereof be it enacted, that no person shall be liable for the payment of any penalty or forfeiture under the recited Acts or this Act, or any byelaw made by virtue thereof, for any offence made cognisable before a justice, unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence. (l)

110. *Acts to be construed as one Act.*—The said recited Acts and this Act shall be construed together as one Act.

111. *Short titles.*—The recited Acts may be respectively cited for all purposes as “The Metropolis Management Act, 1855,” “The Metropolis Management Amendment Act, 1856,” and “The Metropolis Management Amendment Act, 1858;” and this Act may be cited for all purposes as “The Metropolis Management Amendment Act, 1862.”

112. *Interpretation of terms.*—In the construction of the recited Acts and this Act the term “Metropolis” shall be deemed to include the City of London and the parishes and places mentioned in the schedules (A), (B), and (C) to the firstly recited Act; (m) the word “drain” shall be deemed to apply to and include the subject matters specified in s. 250 of the firstly recited Act, and also any drain for draining a group or block of houses by a combined operation, laid or constructed before January 1, 1856, pursuant to the order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers; (n) the expression “water company” shall mean and include any of the companies enumerated in the 15 & 16 Vict. c. 84, s. 29, for the making better provision respecting the supply of water to the metropolis, and also any other company, board, or commission, association, person, or partnership, corporate or unincorporate, for the time being supplying the metropolis or any part thereof with water for domestic use; the word “cattle” shall include sheep, lambs, and swine; the word “street” (o) shall be deemed to apply to

(k) See the Small Penalties Act, 1865, 28 & 29 Vict. c. 32.

(l) See *Higgins v. Norwich Union*, 22 L. T. (N. S.) 752, as to a continuing offence. This limitation clause applies only to the case of pecuniary penalties and forfeitures, and not to offences under s. 75 of this Act: *Bermondsey Vestry v. Johnson*, L. R. 8 C. P. 441. But see *Morant v. Taylor*, L. R. 1 Ex. D. 188. The latter case was approved in *Paddington Vestry v. Shaw*, 45 L. T. 475.

(m) *I.e.* the Act of 1855.

(n) The Commissioners of Sewers are not included in this phrase: *Appleyard v. Lambeth Vestry*, 66 L. J. Q. B. 347, p. 590, *ante*.

(o) See the rules of the County Council as to new streets under s. 99, *post*, pp. 645, 647; and the London Building Act, 1894, *ante*, p. 482.

and include the subject matters specified in s. 250 of the firstly recited Act, and also any mews and a part thereof; the expression "new street" (j) shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out; the word "pave" (g) shall apply to and include the formation of the roadway or footway of any street; the word "clerk" shall include any officer called or to be called "secretary;" the word "surveyor" shall include any officer called or to be called "engineer;" the word "print" shall apply to and include every mode of taking impressions, whether by letterpress, stereotype, lithography, or otherwise.

(p) See *Vestry of St. John, Hampstead v. Hoipel*, 15 Q. B. 19, 652. See *Wilson v. Vestry of St. Giles, Camberwell*, [1892] 1 Q. B. 1; for the case of the footpath only being repairable by the inhabitants at large as distinct from the roadway; in such case the whole road, including the ancient footpath, is a "new street."

This section does not restrict the meaning of "new street;" therefore that expression used in s. 105 of the Act of 1855 includes a new street in the ordinary and popular sense of the term. *St. Giles, Camberwell (Vestry) v. Crystal Palace Co.*, [1892] 2 Q. B. 33. An ancient country highway may become a new street in that sense by the erection of sufficient buildings fronting it, *ibid.* The number and character of the buildings must be looked at, *ibid.* See also on this section, *Hullock v. Reece*, 49 W. R. 23; *Davis v. Greenwich Est. of W.*, [1895] 2 Q. B. 219.

(q) See *Vestry of St. John, Hampstead v. Hoipel*, 15 Q. B. 19, 652; *Wilson v. St. Giles, Camberwell* (1892), 1 Q. B. 1.

METROPOLIS MANAGEMENT AND BUILDING ACTS AMENDMENT ACT, 1878.

41 & 42. VICT. C. 32.

An Act to amend the "Metropolis Management Act, 1855," the "Metropolitan Building Act, 1855," and the Acts amending the same respectively.

[22nd July, 1878.]

PRELIMINARY.

1. *Short title.*—This Act may be cited for all purposes as the "Metropolis Management and Building Acts Amendment Act, 1878."

2. *Limits of Act.* 18 & 19 Vict. c. 120.]—This Act shall extend and apply to the metropolis as defined by the "Metropolis Management Act, 1855."

3. *Division of Act into three parts.*—This Act shall consist of three parts.

PART I.

[5. Metropolis Management Acts and this part of Act to be construed as one Act.]

[11. Power to London County Council in certain cases to require proprietors of theatres and certain music halls in use at the time of the passing of this Act to remedy structural defects. (a)]

[12. Power to London County Council to make regulations with respect to new theatres and certain new music halls for protection from fire.]

[13. Provisional licence for new premises.]

PART III.

[21. Power for architect and persons authorised by Council, and district surveyor, to enter and inspect theatres, music halls, buildings, and works.]

22. (b) *Powers of owners, etc., to enter houses.*—For the purpose of complying with the requirements of any notice or order served or made under the provisions of this Act, on any owner, builder, or person in respect of any

(a) See Part VI. of the London Building Act, 1894. Where the lessee of a theatre covenanted to pay, bear, and discharge certain rates "and every other rate, tax, charge, assessment, burthen, duty, and imposition whatsoever, parliamentary, parochial, or otherwise, to which the lessor now is or shall or may hereafter be liable," the lessor was held to be entitled to recover from the lessee expenses incurred by the lessor in executing certain works in connection with the theatre and in pursuance of a notice given by the Metropolitan Board of Works under this section: *Re Robertson and Thorne*, 47 J. P. 566. The powers of the section must be exercised once for all: *St. James's Hall Co. v. L. C. C.* (1901), 2 K. B. 250.

(b) Repealed so far as it relates to any notice or order served or made under any provision repealed by the London Building Act, 1894.

house, building, or other erection, room, or place, such owner, builder, or person, his servants, workmen, and agents, may, after giving seven days' notice in writing to the occupier of such house, building, or other erection, room, or place, and on production of such notice or order, enter such house, building, or other erection, room, or place, and do all such works, matters, and things therein or thereto, or in connection therewith, as may be necessary; and

if any person refuses to admit such owner, builder, or person, or his servants or workmen or agent, or to afford them all reasonable assistance, such person shall incur for each offence a penalty not exceeding £20.

[23. *Recovery of Penalties.*] 18 & 19 Vict. c. 120.]—Every penalty imposed by Part I. and Part III. of this Act may be recovered by summary proceedings before any justice in like manner and subject to the like right of appeal as if the same were a penalty recoverable by summary proceedings under the Metropolis Management Act, 1855, and the Acts amending the same; *c*

Provided always, that in any proceedings against any person for more than one penalty in respect of one or more breach or breaches of any provision of this Act or of any byelaw made in pursuance of this Act, it shall be lawful to include in one summons all such penalties, and the charge for such summons shall not exceed 2s. (*d*)

[24. 18 & 19 Vict. c. 120.]—Exceptions from Metropolis Management Acts extended to this Act.]

[26. Act not to apply to the Inner and Middle Temple, etc.]

[27. Saving rights of the Crown and Duchy of Lancaster.]

(*c*) *Ante*, pp. 588, 600.

(*d*) As to the recovery of penalties under the Metropolis Management Act, 1855, see s. 277 of that Act, *ante*; and s. 102 of the Act of 1862, *ante*, by which penalties may be recovered in manner provided by 11 & 12 Vict. c. 43.

METROPOLIS MANAGEMENT ACT, 1862, AMENDMENT
ACT, 1890.

53 & 54 VICT. c. 54.

*An Act to amend the seventy-eighth section of the Metropolis Management
Amendment Act, 1862.*

[18th August, 1890.]

1. *Repeal of 25 & 26 Vict. c. 102, s. 78. Vestries and district boards may flag footpaths and recover expense from owners.*—Section 78 of [Metropolis Management Act, 1862] shall be repealed, and in the place thereof there shall be enacted the section following, viz.: In case any footway or any part of a footway laid out at the passing of the 18 & 19 Vict. c. 120, intituled “An Act for the better Local Management of the Metropolis,” (a) shall have been repaired by the vestry or district board of works, or any other public body, but such footway or any part thereof shall not have been flagged or only partially flagged, and the vestry or district board of works shall have deemed it necessary or expedient, or shall deem it necessary or expedient, that the same should be flagged either throughout the whole length or breadth thereof, or any part of such length and breadth respectively, and such vestry or district board shall have flagged or be about to flag the same, the owners of the houses and the owners of the land bounding or abutting on the road or street in which such footway or any part thereof is situate, (b) shall on demand pay to such vestry or district board of works the amount of the expense incurred, or the estimated expense to be incurred, in providing and laying such flagging; and

in the case of estimated expense where the same shall exceed the actual expense of such flagging, then the difference between such estimated expense and such actual expense shall be repaid by the vestry or district board to the owners of houses and land by whom the said estimated expense has been paid; and

in case the said estimated expense be less than the actual expense of such paving, then the owners of the said houses and land shall on demand pay to the vestry or district board such further sum of money as, together with the sum already paid, amounts to the actual expense:

Provided that it shall be lawful for the said vestry or district board to charge the owners of land in a less proportion than the owners of house property should they (the said vestry or district board) deem it just and expedient so to do.

2. *Apportionment and recovery of expenses.*—The expense aforesaid, whether estimated or actual (including the cost of flagging at the points of intersections of street, (c) and all other incidental costs and charges), shall be ascertained and apportioned by the vestry or district board amongst the parties liable to pay the same under the preceding section of this Act, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion, from the owner of the premises, either by action at law or in a summary manner before a justice of the peace at the option of the vestry or district board, as provided

(a) The Act of 1862, *ante*.

(b) The expense of flagging is to be borne by the owners of the houses and the owners of the land on both sides of the road or street: *Paddington Vestry v. North Metropolitan Railway*, [1894] 1 Q. B. 633. See also *St. Mary, Islington (Vestry) v. Cobbett*, [1895] 1 Q. B. 369, as to local authority being liable in respect of an open space vested in them.

(c) As to the meaning of these words, see *Bridgett v. Westminster (Mayor)* (1905), 69 J. P. 394, noted *ante*, p. 597.

for by the two hundred and twenty-fifth section of the said Act of the eighteenth and nineteenth years of the reign of Her present Majesty Queen Victoria.

3. *Vestry or board to keep flagging in repair.*—After any vestry or district board has flagged any footway under the provisions of this Act, the said vestry or board shall keep the said flagging in good and sufficient repair.

4. *Interpretation of terms.*—In the construction of this Act all the provisions contained in s. 250 of 18 & 19 Vict. c. 120, and s. 112 of 25 & 26 Vict. c. 102, shall be deemed and taken to apply to and extend to the provisions of this Act, and the term "flag" or "flagging" shall include asphalt or other similar paving material, and the term "paved" shall include asphalted or other similar paved work.

5. *Construction of Act.*—Except as by this Act expressly amended or varied, the 18 & 19 Vict. c. 120, and the several Acts passed for the amendment of the said Act and this Act shall be construed together as one Act.

6. *Short title.*—This Act may be cited as the Metropolis Management Act, 1862, Amendment Act, 1890.

METROPOLIS MANAGEMENT AMENDMENT ACT, 1890.

53 & 54 VICT. c. 66.

An Act to amend the Metropolis Management Acts.

[18th August, 1890.]

1. *Short title.*]—This Act may be cited for all purposes as the Metropolis Management Amendment Act, 1890.

2. *Interpretation.* 18 & 19 Vict. c. 20.]—In this Act—

“The Metropolis Management Acts” includes the Metropolis Management Act, 1855, and any Acts amending the same.

Terms to which meanings are assigned by the Metropolis Management Acts have the same respective meanings.

“The Council” means the London County Council.

3. (a) *Power to vestry or district board to repair a road or way not being a street.*]—Any vestry or district board may from time to time execute any necessary works of repair upon any or any part of any carriage road within their parish or district which shall have been used for not less than six months for public traffic and which may not at the time of such repair have become repairable by them, and shall not by undertaking such repair prejudice or affect the powers of such vestry or district board to apportion and recover the expenses of paving such road or way if and when the same shall be paved as a new street under the Metropolis Management Acts.

Expenses of repairs.]—The expenses of and incident to such repair may in the first instance be paid by the vestry or district board in the same manner as the expenses of repairing other streets repairable by them, and shall as soon as may be thereafter be apportioned upon and recovered from the owners of the houses and land bounding or abutting on such road or part thereof in the same manner as if such expenses were expenses of paving such road or part thereof as a new street under the provisions of the Metropolis Management Acts relative thereto, and the amount of the expenses so apportioned may be recovered by the vestry or district board in a court of competent jurisdiction.

[*Proviso as to railway companies.*]

4. *Penalty for making sewers contrary to plans approved.*]—Any person making any sewer, or branching any sewer or drain into any sewer vested in the Council, without the approval in writing of the Council first had and obtained, or otherwise than in accordance with a plan and section thereof approved by the Council, or causing any such sewer or drain to be so made or branched, shall be liable to a penalty not exceeding £50.

The Council may by notice in writing to the owner or owners of the premises connected with the sewer or drain so improperly made or branched, or (if there are no such premises) of the land in which it is placed, require such owner or owners forthwith to remove such sewer or drain or to reconstruct the same at his or their expense to the approval of the Council in accordance with the plan and section approved as aforesaid, and

(a) Under this section it is for the vestry or district board to decide as to the necessity of the works, and they are not bound to prove such necessity to the satisfaction of the tribunal before which they seek to recover the expenses: *Stroud v. Wandsworth District Bd.* of W., [1894] 2 Q. B. 1.

In the event of such owner or owners failing to comply with the terms of such requisition, such owner or owners, as the case may be, shall be severally liable to a penalty not exceeding £5 for every day during which he or they shall fail to comply therewith.

And the Council may execute the works required and recover the costs and expenses thereof in a court of summary jurisdiction from the person who shall have made or branched, or caused to be made or branched, the sewer or drain, or from the owner or owners of the premises connected therewith, or (if there are no such premises) of the land in which it is placed.

Provided that if the premises of more than one owner are at the time of the commencement of the work by the Council connected with any such sewer, the costs and expenses thereof shall be apportioned amongst and recoverable from such owners in proportion to the rateable value of the premises respectively connected therewith.

Provided also that in the event of any such costs and expenses being paid to the Council by any such owner or owners, then such owner or owners shall be entitled to recover in a court of summary jurisdiction the amount so paid by them from the person who made or branched or caused such sewer or drain to be made or branched in manner aforesaid.

5. Penalty in case of connections with local sewers.—Any person making any sewer or branching any sewer or drain into any sewer vested in any vestry or district board without the approval in writing of such vestry or district board first had and obtained or otherwise than in accordance with the plan and section thereof, if any, approved by the Council under the provisions of the Metropolis Management Acts relative thereto, or causing any such sewer or drain to be so made or branched, shall be liable to a penalty not exceeding £50. The vestry or district board concerned may, by notice in writing to the owner or owners of the premises connected with the sewer or drain so improperly made or branched, or (if there are no such premises) of the land in which it is placed, require such owner or owners forthwith to remove such sewer or drain or to reconstruct the same at his or their expense to the approval of such vestry or district board and in accordance with the plan and section approved as aforesaid, and in the event of such owner or owners failing to comply with the terms of such requisition, such owner or owners, as the case may be, shall be severally liable to a penalty not exceeding five pounds for every day during which he or they shall fail to comply therewith, and the vestry or district board may execute the works required and recover the costs and expenses thereof in a court of summary jurisdiction from the person who shall have made or branched or caused to be made or branched the sewer or drain, or from the owner or owners of the premises connected therewith, or (if there are no such premises) of the land in which it is placed.

Provided that if the premises of more than one owner are at the time of the commencement of the work by the vestry or district board connected with any such sewer, the costs and expenses thereof shall be apportioned amongst and recoverable from such owners in proportion to the rateable value of the premises respectively connected therewith.

Provided also that in the event of any such costs and expenses being paid to the vestry or district board by any such owner or owners, then such owner or owners shall be entitled to recover in a court of summary jurisdiction the amount so paid by them from the person who made or branched or caused such sewer or drain to be made or branched in manner aforesaid.

6. [Subsoil under a street, road, passage, or way not to be removed without the consent of the vestry, district board, or council. (b)]

(b) Where a street has been laid out or is intended to be laid out on land on which no excavation has as yet taken place, the vestry or district board has no power absolutely to prohibit excavation to a greater extent than allowed by the saving clause, but can only impose conditions as to the levelling and making a proper foundation for the street. *Woods v. North District Bd. v. Bird*, [1892] 1 Q. B. 481.

8. *Limited application of Act to city of London.*—Except so far as relates to any sewers vested in the council, none of the provisions contained in this Act shall have any force or effect within the city of London.

9. *Penalties and expenses.*—Penalties and expenses under this Act may be sued for and recovered either by the council or by the vestry or district board concerned in the same manner as penalties under the Metropolis Management Act, 1855, and the Acts amending the same.

10. *Expenses of Act.*—Any costs, charges, and expenses incurred by the council of and incidental to the preparing, applying for, and passing of this Act shall be paid by the council.

PUBLIC HEALTH (LONDON) ACT, 1891.

54 & 55 VICT. c. 76.

An Act to consolidate and amend the Laws relating to Public Health in London.

[5th August, 1891.]

Be it enacted, etc.

Regulations as to Water closets, etc.

37. (a) *Obligation to provide waterclosets, etc.*—1) It shall not be lawful newly to erect any house or to rebuild any house pulled down to or below the ground floor without a sufficient ashpit furnished with proper doors and coverings, and one or more proper and sufficient waterclosets according as circumstances may require, furnished with suitable water supply and water supply apparatus, and with suitable trapped pan and other suitable works and arrangements, so far as may be necessary to ensure the efficient operation thereof.

2) If any person offends against the foregoing enactment of this section, he shall be liable to a fine not exceeding £20.

3) If at any time it appears to the sanitary authority that any house, whether built before or after the commencement of this Act, is without such a pit or waterclosets as aforesaid, the sanitary authority shall cause notice (b) to be served on the owner or occupier of the house, requiring him forthwith, or within such reasonable time as is specified in the notice, to provide the same in accordance with the directions in the notice; c) and, if the notice is not complied with, the said owner or occupier shall be liable to a fine not exceeding £5, and a further fine not exceeding 40s. for each day during which the offence continues; or the sanitary authority, if they think fit, in lieu of proceeding for a fine, may enter on the premises and execute such works as the case may require, and may recover the expenses incurred by them in so doing from the owner of the house. (d)

(4) Provided that—

(a) where a sewage or water supply sufficient for a water-closet is not reasonably available, this section shall be complied with by the provision of a privy or earth closet; and

(b) where a water-closet has before the commencement of this Act been and is used in common by the inmates of two or more houses, and in the opinion of the sanitary authority may continue to be properly so used, they need not require a water-closet to be provided for each house.

(5) This section substantially re-enacts s. 81 of the Metropolis Management Act, 1855, which is now repealed.

(6) It was held under the old section that a notice by an Inspector, without a resolution of the vestry, or committee thereof, but only of a meeting of three members of a sub-committee, was bad: *St. James's Vestry v. Hume*, 10 J. P. 132. For a case in which the notice was moved upon the grounds of the plaintiff's tenant's interest, see *Long v. Long and Co. v. Long v. Co. v. Hume* (1891), 2 Q. B. 101.

(7) It was held under the old section that if the owner objected to the order of the vestry, his proper remedy was to appeal to the County Council, and if he did not do so, the magistrate was bound to commit in a summons: *James and John, Trustees v. Vestry* v. *Westry*, 24 Q. B. D. 701.

(8) See under 41 section, *St. Luke, Midsex (Vestry) v. Long*, 31 L. J. M. C. 73. A sanitary authority could not under the old Act lay down a general rule: *Towner v. Hume*, 27 L. J. Ch. 412. As to the liability of a tenant to carry out the works, see *Long v. St. Luke's Vestry* (1891), 67 J. P. 42; *Hume v. Hume* (1891), 1 K. B. 11.

(5) Any person who thinks himself aggrieved by any notice or act of a sanitary authority under this section may appeal to the county council, whose decision shall be final. (e)

38. [f] Sanitary conveniences for manufactories, etc.]—(1) Every factory, workshop, and workplace, (g) whether erected before or after the passing of this Act, shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed in or in attendance at such building, and also where persons of both sexes are, or are intended to be, employed, or in attendance, with proper separate accommodation for persons of each sex.

(2) Where it appears to a sanitary authority that this section is not complied with in the case of any factory, workshop, or workplace, the sanitary authority shall, by notice served on the owner or occupier of such factory, workshop, or workplace, require him to make the alterations and additions necessary to secure such compliance, and if the person served with such notice fails to comply therewith he shall be liable to a fine not exceeding £20, and to a fine not exceeding 40s. for every day after conviction during which the non-compliance continues.

39. Byelaws as to waterclosets, etc.]—(1) The county council shall make byelaws with respect to waterclosets, earth closets, privies, ashpits, cesspools, (h) and receptacles for dung, and the proper accessories thereof in connection with buildings, whether constructed before or after the passing of this Act.

(2) Every sanitary authority shall make byelaws with respect to the keeping of waterclosets supplied with sufficient water for their effective action.

(3) It shall be the duty of every sanitary authority to observe and enforce the byelaws under this section; and any directions given by the sanitary authority under this Act shall be in accordance with the said byelaws, and so far as they are not so in accordance shall be void.

[40. Power for sanitary authority to authorise examination of waterclosets, etc.]

41. Penalty on persons improperly making or altering waterclosets, etc.]—(1) In any of the following cases:—

(a) if, on such examination as in the preceding section mentioned, any such work as therein mentioned is found not to have been made or provided by any person according to the byelaws of the county council and sanitary authority, and the directions (i) of the sanitary authority given in any notice under this Act, or to be contrary to this Act, or

(b) if a person, without the consent of the sanitary authority, constructs or rebuilds any watercloset, earth closet, privy, ashpit, or cesspool which has been ordered by them either not to be made, or to be demolished; or

(c) if a person discontinues any water supply without lawful authority; or

(d) if a person destroys any sink, trap, siphon, pipe, or any connected works or apparatus as aforesaid either without lawful authority or so that the destruction creates a nuisance or is injurious or dangerous to health,

every person so offending shall be liable to a fine not exceeding £10; and if he does not, within fourteen days after notice is served on him by the sanitary authority, or within any further time allowed by that authority or appearing to a petty sessional court necessary for the execution of the works, cause such watercloset, earth closet,

(c) A magistrate is bound by the decision of the sanitary authority that the accommodation is insufficient: *St. John's, Hackney (Vestry) v. Hutton* (1897), 1 Q. B. 210.

(f) As to factories generally, see s. 9 of the Factory and Workshop Act, 1901.

(g) This has a wider meaning than factory or workshop. It includes a stable and stable yard, where a number of hirers of cabs attend as customers: *Bennett v. Harding* (1900), 2 Q. B. 397.

(h) See *Simmons v. Mallory R. D. C.* (1897), 1 Q. B. 433.

(i) On a summons taken out for non-compliance with the directions of a local authority, the magistrate has jurisdiction to inquire into the validity of those directions: *Fulham Vestry v. Solomon* (1896), 1 Q. B. 198.

privy, ashpit, or cess-pool to be altered or reinstated in conformity with the said bye-laws and directions, or, at the case may be, to be demolished, or such water supply to be renewed, or such sink, trap, siphon, pipe, or other connected works or apparatus to be restored, such person shall be liable to a fine not exceeding 20s. for each day during which the offence continues; or the sanitary authority, if they think fit, in lieu of proceeding for a fine, may enter on the premises and cause the work to be done, and the expenses thereof shall be paid by the person who has so offended.

[2] Power, if on such examination any watercloset, earth closet, privy, ashpit, or cess-pool, or any water supply, sink, trap, siphon, pipe, or any of the connected works or apparatus, appears to be in bad order and condition, or to require cleaning, alteration, or amendment, (k) or to be filled up, to require the owner or occupier to do what is necessary to place the work in proper order and condition.]

(3) Any person who thinks himself aggrieved by any notice or act of a sanitary authority under this section in relation to any watercloset, earth closet, privy, ashpit, or cess-pool, may appeal to the county council, whose decision shall be final.

42. *Improper construction or repair of watercloset or drain.*—If a watercloset or drain is so constructed or repaired as to be a nuisance or injurious or dangerous to health, the person who undertook or executed such construction or repair shall, unless he shows that such construction or repair was not due to any wilful act, neglect, or default, be liable to a fine not exceeding £20.

Provided that where a person is charged with an offence under this section he shall be entitled, upon information duly laid by him, to have any other person, being his agent, servant, or workman, whom he charges as the actual offender, brought before the court at the time appointed for hearing the charge, and if he proves to the satisfaction of the court that he had used due diligence to prevent the commission of the offence, and that the said other person committed the offence without his knowledge, consent, or connivance, he shall be exempt from any fine, and the said other person may be summarily convicted of the offence.

Provisions as to Water.

48. *Provisions as to house without proper water supply.*—(1) An occupied house without a proper and sufficient supply of water shall be a nuisance liable to be dealt with summarily under this Act, and, if it is a dwelling-house, shall be deemed unfit for human habitation.

(2) A house which after the commencement of this Act is newly erected, or is pulled down to or below the ground floor and rebuilt, shall not be occupied as a dwelling-house until the sanitary authority have certified that it has a proper and sufficient supply of water, either from a water company or by some other means.

(3) If the sanitary authority refuse such certificate, or fail to give it within one month after written request for the same from the owner of the house, the owner of the house may apply to a petty sessional court, and that court, after hearing or giving the sanitary authority an opportunity to be heard, may, if they think the certificate ought to have been granted, make an order authorising the occupation of the house; but, unless such order is made, an owner who occupies or permits to be occupied the house as a dwelling-house without such certificate shall be liable to a fine not exceeding £10, and to a fine not exceeding 20s. for every day during which it is so occupied until a proper and sufficient supply of water is provided; but the imposition of such fine shall be without prejudice to any proceedings for obtaining a closing order.

[40. Notice to sanitary authority of water supply being cut off.]

(4) This alteration and amendment do not comprise structural alterations: *per* Kennedy, J., in *Fulham Vestry v. Solomon* (1896), 1 Q. B. 194, at p. 201 in the L. R.

Underground Rooms. (l)

[96. Provisions as to the occupation of underground rooms as dwellings.]

Byelaws.

[114. Byelaws—how made.]

Legal Proceedings.

[115. General provisions as to powers of entry.]

117. Summary proceedings for offences, expenses, etc.]—(1) All offences, fines, penalties, forfeitures, costs, and expenses under this Act or any byelaw made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts.

(2) Proceedings for the recovery of a demand not exceeding £50, which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the county court as if such demand were a debt.

(3) A proceeding under this Act shall not be taken by the county council against a sanitary authority save with the sanction of the Local Government Board, unless such proceeding is for the recovery of expenses or of money due from the sanitary authority to the council.

118. Evidence by defendant.]—Any person charged with any offence under this Act, and the wife or husband of such person, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

121. Recovery of expenses by sanitary authority from owner or occupier.]—Any costs and expenses which are recoverable under this Act by a sanitary authority from an owner of premises may be recovered from the occupier for the time being of such premises; and the owner shall allow the occupier to deduct any money which he pays under this enactment out of the rent from time to time becoming due in respect of the premises, as if the same had been actually paid to the owner as part of the rent: Provided that—

(a) the occupier shall not be so required to pay any further sum than the amount of rent which either is for the time being due from him, or which after demand from him of such costs or expenses, and notice not to pay any rent without first deducting the same, becomes payable by him, unless he refuses, on the application of the sanitary authority, truly to disclose the amount of his rent and the name and address of the person to whom such rent is payable; but the burden of proof that the sum demanded from any such occupier is greater than the aforesaid amount of rent shall lie on such occupier; and

(b) nothing in this section shall affect any contract between any owner and occupier of any premises whereby the occupier agrees to pay or discharge all rates, dues, and sums of money payable in respect of such premises, or shall affect any contract whatsoever between landlord and tenant.

Appeal.

125. Appeal to quarter sessions.]—Any person who deems himself aggrieved by any conviction or order made by a court of summary jurisdiction on determining any information or complaint under this Act may, save as otherwise provided in this Act, appeal therefrom to a court of quarter sessions.

(l) See also ss. 40 and 70 of the London Building Act, 1894, *ante*, pp. 493 and 505.

126. *Provision as to appeals to county council.* 18 & 19 Vict. c. 120.]—Any appeal to the county council against a notice or act of a sanitary authority under this Act shall be conducted in accordance with ss. 211 and 212 of the Metropolis Management Act, 1855, which sections, as modified by the Local Government Act, 1888, are set out in the First Schedule to this Act.

Notices.

127. *Authentication of notices, etc.*—(1) Notices, orders, and other such documents under this Act shall be in writing, and notices and documents other than orders, when issued by the county council or a sanitary authority, shall be sufficiently authenticated if signed by their clerk or by the officer by whom the same are given or served.

(2) Orders shall be under the seal of the council or authority duly authenticated.

128. (a) [*Service of Notices.*]

Miscellaneous Provisions.

[130. Form in Third Schedule may be used.]

132. *Extent of Act.*—This Act shall (save as otherwise expressly provided) extend only to London.

Provided that this Act shall extend to places elsewhere so far as is necessary for giving effect to any provisions thereof in their application to London and to any places to which such provisions are expressly applied.

[138. Powers of Act to be cumulative.]

Interpretation.

141. *Interpretation of terms.*—In this Act, unless the context otherwise requires,—

The expression "London" means the administrative county of London;

The expression "county council" means the London County Council;

The expression "street" includes any highway, and any public bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not, and whether or not there are houses in such street;

The expression "premises" includes manufactory, buildings, lands, enclosures, and hereditaments of any tenure, whether open or enclosed, whether built on or not, and whether public or private, and whether maintained or not under statutory authority;

The expression "house" includes school, also factories and other buildings in which persons are employed;

The expressions "building" and "house" respectively include the cartilage of a building or house, and include a building or house wholly or partly erected under statutory authority;

The expression "owner" (in matters relating to the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rackrent:

(a) A summons to answer a complaint as to a nuisance is good in form, though only addressed to "the owner," and such summons is a document within the meaning of this section. *R. v. Wood*, 1884, 2 Q. B. 124.

(b) Where the lease of premises is not let at a rackrent has effect for the whole term, less a few days, the rent reserved and the covenants and conditions being the same as in the original lease, the covenants, and not the lease, is the owner. *Townshend v. Heath*, *London & C. v. Akerley*, 1881, 2 Q. B. 771. See also s. 5 of the Building Act, 1891, ante; s. 209 of the Management Act, 1855, ante; and s. 4 of the Public Health Act, 1875, post.

The expression "rackrent" means rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises; and the full annual value shall be taken to be the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the premises, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge (if any), and if the landlord undertook to bear the cost of the repairs, and insurance, and the other expenses (if any) necessary to maintain the premises in a state to command such rent: (o)

The expression "sanitary convenience" includes urinals, waterclosets, earth closets, privies, and any similar conveniences:

The expression "day" means the period between six o'clock in the morning and the succeeding nine o'clock in the evening:

The expression "ashpit" means any ashpit, dust-bin, ash-tub, or other receptacle for the deposit of ashes or refuse matter:

The expression "cistern" includes a water-butt.

142. [*Repeals.*]

(o) This is similar to the definition of "rackrent" which is to be found in s. 6 of the London Building Acts Amendment Act, 1905, *ante*, p. 560.

PUBLIC HEALTH ACT, 1875.

38 & 39 VICT. c. 55.

An Act for consolidating and amending the Acts relating to Public Health in England. [11th August, 1875.]

4. *Definitions (a.)*—In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say,

"Person" includes any body of persons, whether corporate or unincorporate;

"Local authority" means urban sanitary authority and rural sanitary authority;

"Surveyor" includes any person appointed by a rural authority to perform any of the duties of surveyor under this Act; (b)

"Lands" and "premises" (c) include messuages, buildings, lands, easements and hereditaments of any tenure;

"Owner" (d) means the person for the time being receiving the rackrent of the land or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent;

"Rackrent" means rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises; and the full net annual value shall be taken to be the rent at which the property might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and title commutation rentcharge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain the same in a state to command such rent; (e)

"Street" includes (f) any highway (g) (not being a turnpike road), and any

(a) See further definitions in s. 11 of the Public Health Act, 1890.

(b) *Lewis v. West-super-Mare L. Bd.*, 40 Ch. D. 55.

(c) *Birmingham Corporation v. Barker*, L. R. 17 Ch. D. 782.

(d) As to the cases decided upon the definition of "owner," see the note to s. 5 of the London Building Act, 1894, *ante*, p. 176, and see also s. 250 of the Metropolitan Management Act, 1857, *ante*, p. 100 and s. 141 of the Public Health (London) Act, 1891, *ante*, p. 613.

A receiver is not "owner," *Thorp Corporation v. Smith*, 14 Ch. D. 395. A mortgage in possession is "owner," *Trotter v. L. Bd.*, v. *West*, 62 L. J. Q. B. 322. Trustees with the legal estate in trust for charitable trusts for life, are owners: *Re Harney, Harrison v. Harney*, [1884] 3 Ch. 502. So is a trustee for charitable purposes in whom property is vested, although the property cannot be let by reason of a special condition imposed by the legislature: *Re Christ Church Finance Act, Meek v. A. G.*, [1894] 3 Ch. 209. See also *East v. Thompson* (1897), 1 Ch. 200 and p. 517, *ante*, and see *Walden v. Walker* (1906), 70 J. P. 199.

(e) As to the meaning of "owner" and "rackrent" in a private Act, see *Mayor of St. Helens v. Riley* (or *Atkinson*), 47 J. P. 471. (f) The definition of rackrent in the London Building Act Amendment Act, 1907, s. 6, *ante*.

(g) The insertion of this word has effect to allow the word "street" to receive its popular and natural sense whenever that would be properly applicable: *Ross v. Fort L. Bd.*, (1883), 8 A. C. 798, per Lord Selborne, L. C.

(7) A road which was not a highway before the Highway Act, 1835, but which has since become a highway, but not repairable by the inhabitants at large, is a "street": *London v. Corbett L. Bd.*, [1881] 2 Q. B. 216.

public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, (*h*) whether a thoroughfare or not : (*i*)

"House" includes schools, also factories and other buildings in which [*more than twenty*] persons are employed [*at one time*] : (*h*)

"Drain" means any drain of and used for the drainage of one building only, (*l*) or premises within the same curtilage, (*m*) and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed :

"Sewer" (*n*) includes sewers and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act :

"Water company" means any person or body of persons corporate or unincorporate supplying or who may hereafter supply water for his or their own profit :

"Waterworks" includes streams, springs, wells, pumps, reservoirs, cisterns, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, engines, and all machinery, lands, buildings, and things for supplying or used for supplying water, also the stock in trade of any water company :

"Sanitary Acts" means all the above-mentioned Acts and the Acts mentioned in Part I. of Schedule V. to this Act :

"Sanitary purposes" means any object or purposes of the Sanitary Acts :

"Court of quarter sessions" means the court of general or quarter sessions of the peace having jurisdiction over the whole or any part of the district or place in which the matter requiring the cognisance of general or quarter sessions arises :

"Court of summary jurisdiction" means any justice or justices of the peace, stipendiary or other magistrate or officer, by whatever name called, to whom jurisdiction is given by the Summary Jurisdiction Acts or any Acts therein referred to :

(*h*) As to passages leading to the back of houses, see *R. v. L. Bd. of Goolc*, [1891] 2 Q. B. 212, 595.

(*i*) In spite of this definition, the word "street" is used in the Act in different senses. See ss. 16, 26, 149, and 150. It is a question of fact for the justices to determine whether or not a road which has been sewered is a street within s. 150 ; and they are not bound to find, as matter of law, that it is a street by the terms of the definition in this section : *Maude v. Baildon L. Bd.*, L. R. 10 Q. B. D. 394 ; questioned in *Corporation of Portsmouth v. Smith*, L. R. 13 Q. B. D. 184. A "new street" does not necessarily mean a street constructed for the first time : *Robinson v. L. Bd. of Barton Eccles*, L. R. 21 Ch. D. 621 ; *Simmonds v. Fulham Vestry* (1900), 2 Q. B. 188.

Where a building owner had ground abutting on one side of a lane, 250 feet long and 6 feet wide, adjoining a town, and, there being no other houses, he built six cottages standing back 15 feet from the lane, instead of 18 as required by a byelaw, it was held that the mere fact of six cottages being built in the lane did not make it a new street : *Williams v. Powning*, 48 L. T. 672. Decisions on the meaning of "new street" in this Act govern the construction of the same words in the Towns Improvement Clauses Act, 1847, being *in pari materia* : *A.-G. v. Rufford* (1899), 1 Ch. 537, following *Robinson v. Barton Eccles*, *supra*. See also as to what amounts to laying out new street, *Bushell v. Creer* (1900), 64 J. P. 600 ; *Walthamstow U. D. C. v. Sandell* (1904), 68 J. P. 509.

(*l*) The words in brackets were repealed by the Factory Act, 1878. See the numerous cases relating to this definition which are summarised in *Lumley's Public Health* (6th ed.) at p. 16.

(*l*) As to the meaning of "one building only," see *Hedley v. Webb* (1901), 2 Ch. 126.

(*m*) As to houses within the same curtilage, see *Harries v. Scurfield* (1904), 68 J. P. 516 ; *Pilbrow v. St. Leonard's, Shoreditch* (1895), 1 Q. B. 428.

(*n*) See *Acton L. Bd. v. Batten*, L. R. 28 Ch. D. 283 ; *Meador v. West Cowes L. Bd.*, [1892] 3 Ch. 18. An owner may undertake that a pipe shall be a private drain and repairable by him, although it receives the drainage of more than one house : *Butt v. Snow* (1903), 67 J. P. 454. A drain passing through private ground, but receiving the drainage of more than one building, is a "sewer" : *Travis v. Utley*, [1894] 1 Q. B. 233, commented on in *Eastbourne (Mayor) v. Bradford* (see note to P. II. A., 1890, s. 19), and explained in *Beckenham U. D. C. v. Wood* (1896), 60 J. P. 490. See also *L. N. W. Ry. v. Runcorn* (1898), 1 Ch. 561 ; *Pakenham v. Titchhurst R. D. C.*, 67 J. P. 448.

"Summary Jurisdiction Act" means the 11 & 12 Vict. c. 43, intitled "An Act to facilitate the performance of the duties of the justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," and any Act amending the same.

PART III.

SANITARY PROVISIONS.

SEWERAGE AND DRAINAGE. (c)

Regulations as to Sewers and Drains.

13. *Sewers vested in local authority.*—All existing and future sewers (p) within the district of a local authority, together with all buildings, works, materials, and things belonging thereto,

Except

- (1) Sewers made by any person for his own profit, (q) or by any company for the profit of the shareholders; and
- (2) Sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, (r) or for the purpose of irrigating land; and
- (3) Sewers under the authority of any commissioners of sewers appointed by the Crown, shall vest in and be under the control of such local authority.

Provided that sewers within the district of a local authority which have been or which may hereafter be constructed by or transferred to some other local authority or by or to a sewage board or other authority empowered under any Act of Parliament to construct sewers shall (subject to any agreement to the contrary) vest in and be under the control of the authority who constructed the same or to whom the same have been transferred. (s)

14. *[Purchase of sewers by local authority.]*

15. *Maintenance and making sewers.*—Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act. (t)

(c) See further provisions as to sewerage, Public Health Act, 1890, *post*, p. 636.

(p) See *Meador v. West Indies L. Bd.*, [1892] 3 Ch. 18; *Travis v. Cutley*, [1894] 1 Q. B. 284, *supra*. A local authority may accept a sewer, although it has no outfall: *Hornby L. Bd. v. Davis*, [1897] 1 Q. B. 756. A channel or gutter at the side of a road which drains the surface water, may be a "sewer" within this section, and (*per* Vaughan Williams, J.) *Keweenaw Ptery Co. v. Pore Corporation* (1899), 2 Q. B. 41, is not a decision that drains may be sewers for some of the purposes of the Public Health Act, 1875, and not for others: *Widdowson v. Lonsdale & Co.*, R. D. C. [1901], 2 Ch. 693. See also *Sykes v. Sowerby L. D. C.*, [1900], 1 Q. B. 581; *Humphrey v. Lonsdale* [1903], 1 K. B. 44.

(q) *Terrill v. Horns L. Bd.*, [1893] 2 Q. B. 135; *Minckell L. Bd. v. Luttrell*, [1891] 2 Ch. 178; *Wales v. Lonsdale*, W. N. 1895, p. 42; *Cresswell v. Sunbury-on-Thames Urban Comm.* [1898], 2 Ch. 515. A sewer constructed by quarry owners for the purpose of preventing surface water entering their quarry is a sewer made by them for their profit. *Sykes v. Sowerby L. D. C.*, [1900], 1 Q. B. 581.

(r) See *L. & N. W. Ry. v. Rye Green R. C.* (1888), 1 Ch. 561.

(s) See *Taylor v. Corporation of Oldham*, 4 Ch. D. 295; *Creedale v. Charlton*, 4 Q. B. D. 113; and also *Pear v. St. George's, S. Church*, 11 Ch. D. 785, as to the property in that portion of the soil through which the sewers run.

As to the meaning of the word "sewer" in this Act, see *Atten L. Bd. v. Lott*, 28 Ch. D. 283.

(t) See on this section, *Avril & Co. L. Bd. v. Ley*, [1892] 2 Q. B. 271; *Reg. v. Hastings (Mayor)* [1897], 1 Q. B. 46. See Rivers Pollution Act, 1876, 39 & 40 Vict. c. 75, s. 7. As to the liability of the local authority, see *Wate v. Hinckley L. Bd.*, L. R. 10 Q. B. 219; *Smith v. West India L. Bd.*, as L. T. N. S. 716.

As to the liability of landowners to preserve subject support to a sewer, and as to their

16. *Powers for making sewers.*—Any local authority may carry any sewer through, across, or under any turnpike road, or any street (*w*) or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary (*w*)), into, through, or under any lands whatsoever within their district. (*x*)

They may also (subject to the provisions of this Act relating to sewage works without the district of the local authority) exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage. (*y*)

17. [*Purification of sewage before discharge into stream.*]

18. *Alteration and discontinuance of sewers.*—Any local authority may from time to time enlarge, lessen, alter the course of, cover in, or otherwise improve any sewer belonging to them, and may discontinue, close up, or destroy any such sewer that has in their opinion become unnecessary, on condition of providing a sewer (*z*) as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer:

Provided that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance.

19. *Cleansing sewers.*—Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied. (*u*)

20. [*Map of system of sewerage to be kept.*]

right to compensation—(i) for being deprived of free power to work subjacent mines, and (ii) for the risk of percolation of sewage into those mines, *In re Corporation of Dudley*, L. R. 8 Q. B. D. 86; and see now Public Health Act, 1875, Amendment Act, 1883, s. 4.

Notwithstanding the obligation imposed by this Act on a local board to drain their district, their right to send the sewage of their district, directly or indirectly, into the sewers of an adjoining district is, unless otherwise provided, no higher than the right of a landowner to send sewage from his land into the land or into the drains of a neighbouring landowner: *Att.-Gen. v. Acton L. Bd.*, 22 Ch. D. 221. Where the local authority fail to effectually drain their district, they cannot proceed against the owner of property which is creating a nuisance for abatement of the nuisance, which would not have been caused but for the authority's neglect to perform its duty: *Fordom v. Parsons*, [1894] 2 Q. B. 780. An action for *mandamus* does not lie to compel a local authority to perform their duty under this section. The proper remedy is to apply to the Local Government Board under s. 299: *Pasmore (or Peebles) v. Oswaldtwistle U. D. C.* (1898), A. C. 387. But see *Baron v. Portslade U. D. C.*, cited in the note to s. 19, *post*, where it was held that an action lies for mere negligence, as where the authority neglect to cleanse a sewer.

(*u*) Includes a private street: *Hill v. Wallasey L. Bd.*, [1894] 1 Ch. 133.

(*v*) Means "necessary for the efficient discharge in the way most for the benefit of the public." *Lewis v. Weston-super-Mare L. Bd.*, 40 Ch. D. The surveyor is the person to determine the necessity, *ib.*

"Surveyor" means fit and proper person duly appointed under s. 189, and no other person, *ib.* See *Jones v. Conway, etc., Water Supply Bd.*, [1893] 2 Ch. 603.

(*x*) *In re Corporation of Dudley*, 8 Q. B. D. 86. As to the assessment of compensation, see *Colac v. Summerfield* (1893), A. C. 187; *Davis v. Witney U. D. C.* (1899), 63 J. P. 279.

(*y*) For the provisions as to sewage works without the district, ss. 32-34, *post*. Forms and services of notices, ss. 266, 267.

(*z*) At the general expense; owner of house cannot be charged as for private improvement expenses: *Festry of Marylebone v. Viret*, 19 C. B. N. S. 424; *Fulham Dist. Bd. v. Goodwin*, 1 Ex. D. 400. As to the necessity of providing private drains when the public sewer is changed, see *St. Martin-in-the-Fields Festry v. Ward* (1897), 1 Q. B. 40.

(*a*) The word "ventilated" is new. See a similar provision of the Metropolis Management Act (1855), 18 & 19 Vict. c. 120, s. 72. See *Att.-Gen. v. Mayor of Basingstoke*, 45 L. J. Ch. 726, as to the liability of the local authority to have an information filed against them. Where a sewer becomes insufficient by increase of drainage, and damage occurs by flooding, the local authority is not liable, in the absence of negligence: *Stretton's Derby Brewery Co. v. Derby (Mayor of)*, [1894] 1 Ch. 431. But see *Baron v. Portslade-by-Sea U. C.* (1900), 2 Q. B. 588.

21. Power of owners and occupiers within district to drain into sewers of local authority.]—The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications. (b)

Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding £20, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses so incurred by them under this section. (c)

22. Use of sewers by owners and occupiers without district.]—The owner or occupier of any premises within the district of a local authority may cause any sewer or drain from such premises to communicate with any sewer of the local authority on such terms and conditions as may be agreed on between such occupier and such local authority, or as in case of dispute may be settled, at the option of the owner or occupier, by a court of summary jurisdiction or by arbitration in manner provided by this Act. (d)

23. Power of local authority to enforce drainage of undrained houses.]—Where any house within the district of a local authority is without a drain sufficient for effectual drainage, the local authority shall by written notice require the owner or occupier of such house, within a reasonable time therein specified, to make a covered drain or drains emptying into any sewer which the local authority are entitled to use, and which is not more than one hundred feet from the site of such house; but if no such means of drainage are within that distance, then emptying into such covered cesspool or other place not being under any house as the local authority direct; and

the local authority may require any such drain or drains to be made of such materials and size, and to be laid at such level, and with such fall as on the report of their surveyor may appear to them to be necessary. (e)

If such notice is not complied with, the local authority may, after the expiration of the time specified in the notice, do the work required, and may recover in a

(b) See *Humphreys v. Cousins*, 2 C. P. D. 261, as to the responsibility of owners of drains for leakage. See s. 13; *Kirkham v. L. Bd.*, 1 A. & E. (1892), 2 Q. B. 274, *per* Lord Esher, and s. 18 of Public Health Act, 1880.

See *Charles v. Fitzroy L. Bd.*, 23 Ch. D. 767. This section involves the right to pass trade effluents into the sewer; *Perreux v. Ormeau L. D. Co.* (1897), 1 Q. B. 469, *per* Charles, J., at 472; *East v. L. Bd.*, 1 Q. B. 1901, 1 Ch. 645.

(c) See s. 208 as to the general right of appeal to the Local Government Board. An owner of property may not bring the sewage of fresh houses through an existing drain into a sewer, except as permitted by the local authority. *Metropolitan Board v. L. and N. W. Ry. Co.*, 11 C. B. 21; and at p. 24, *note*, decided under s. 61 of the Metropolitan Management Act of 1862, *note*. See *Cockburn v. Hume*, 26 L. J. Ex. 34, as to user of drains, and Chap. XXII.

(d) It appears that the local authority cannot refuse to allow the communication to be made; and the owners or occupiers have the right, although the sewers are not large enough. See *Common Ld. v. Corporation Ld.*, 12 Ch. D. 725. See s. 22 *et seq.* The Court has jurisdiction under Or. xiv. r. 5 of the Rules of the Supreme Court to pronounce a declaratory judgment as to the right of connecting up with a sewer; but this will only be exercised with caution: *Fisher v. Lambeth L. D. Co.*, 67 J. P. 157.

(e) See *Anders v. St. Mary, Lambeth*, 1 C. P. D. 27, 1 L. J. Ch. 388, 677, where the Court refused to interfere with the local authority's decision as to the materials, Aylesford pipes having been used in place of Lambeth pipes in the construction of the drains. As to the right to send the sewage of the district into the sewers of an adjoining district, see *Metcalf v. L. Bd.*, 22 Ch. D. 221. The local authority cannot under this section require an owner to provide new drains communicating with a new sewer which they have constructed: *St. Helens-on-the-Wall (Verger) v. Ward* (1897), 1 Q. B. 40.

summary manner the expenses incurred by them in so doing from the owner, or may by order declare the same to be private improvement expenses.

Provided that where, in the opinion of the local authority, greater expense would be incurred in causing the drains of two or more houses to empty into an existing sewer pursuant to this section, than in constructing a new sewer and causing such drains to empty therein, the local authority may construct such new sewer, and require the owners or occupiers of such houses to cause their drains to empty therein, and may apportion as they deem just the expenses of the construction of such sewer among the owners of the several houses, and recover in a summary manner the sums apportioned from such owners, or may by order declare the same to be private improvement expenses. (*f*)

24. Power of local authority to require houses to be drained into new sewers.]—Where any house within the district of a local authority has a drain communicating with any sewer, which drain though sufficient for the effectual drainage of the house is not adapted to the general sewerage system of the district, or is in the opinion of the local authority otherwise objectionable, the local authority may, on condition of providing a drain or drains as effectual for the drainage of the house, and communicating with such other sewer as they think fit, close such first-mentioned drain, and may do any work necessary for that purpose, and the expenses of those works, and of the construction of any drain or drains provided by them under this section, shall be deemed to be expenses properly incurred by them in the execution of this Act. (*g*)

25. Penalty on building house without drains in urban district.]—It shall not be lawful in any urban district

newly to erect any house or

- to rebuild any house which has been pulled down to or below the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed, of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house; and

the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use, and which is within 100 ft. of some part of the site of the house to be built or rebuilt; but if no such means of drainage are within that distance, then shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct. (*h*)

Any person who causes any house to be erected or rebuilt or any drain to be constructed in contravention of this section shall be liable to a penalty not exceeding £50.

26. Penalty on unauthorised building over sewers and under streets in urban district.]—Any person who in any urban district, without the written consent of the urban authority,—

- (1) Causes any buildings (*i*) to be newly erected over any sewer of the urban authority; or,

(*f*) In the case of a row of undrained houses, it would frequently be cheaper to construct a new sewer, and the proviso at the end of this section enables the local authority to do this.

See *Fulham Dist. Bd. v. Goodwin*, 1 Ex. D. 400, as to apportionment where the local authority make a new system of drainage for the district generally. See also *Bradley v. Greenwich Dist. Bd.*, 47 L. J. M. C. 111, as to limit of time for apportionment; and *Hall v. Mayor, etc., of Batley*, 47 L. J. Q. B. 148, as to the conditions of this section in general, and liability for damages by negligence.

(*g*) The local authority cannot escape liability under this section by requiring the owner to provide new drains under colour of s. 23, *ante*: *St. Martin-in-the-Fields Vestry v. Ward* (1897), 1 Q. B. 40.

(*h*) See *Mathews v. Strachan* (1901), 2 K. B. 540. This section is a distinct enactment that a person who erects a house must provide a drain for it: *Woodford U. D. C. v. Stark* (1902), 66 J. P. 536.

(*i*) See note to s. 4, *ante*.

(2) Causes any vault, arch, or cellar to be newly built or constructed under the carriageway of any street, shall forfeit to the urban authority the sum of £5 and a further sum of 40s. for every day during which the offence is continued after written notice in this behalf from the urban authority; and the urban authority may cause any building, vault, arch, or cellar erected or constructed in contravention of this section to be altered, pulled down, or otherwise dealt with as they may think fit, and may recover in a summary manner any expenses incurred by them in so doing from the offender. (j)

As to Sewage Works without District.

[32. Notice to be given before commencing sewage works without district. (k)]

[33. In case of objection, works not to be commenced without the sanction of Local Government Board.]

[34. Inspector to hold inquiry and report to Local Government Board.]

PRIVIES, WATERCLOSETS, ETC. (l)

35. *Penalty on building houses without privy accommodation.*—It shall not be lawful newly to erect any house, or to rebuild any house pulled down to or below the ground floor, without a sufficient watercloset, earthcloset, or privy and an ashpit furnished with proper doors and coverings.

Any person who causes any house to be erected or rebuilt in contravention of this enactment shall be liable to a penalty not exceeding £20. (n)

36. (o) *Power of local authority to enforce provision of privy accommodation for houses.*—If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient watercloset, earthcloset, or privy and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient watercloset, earthcloset, or privy and an ashpit furnished as aforesaid, or either of them, as the case may require.

If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses: (p)

Provided that where a watercloset, earthcloset, or privy has been and is used in common by the inmates of two or more houses, or if in the opinion of the local authority a watercloset, earthcloset, or privy may be so used, they need not require the same to be provided for each house.

(j) *Public Health Act, v. Kent*, 28 L. J. M. C. 37. See ss. 191-194 of the Metropolitan Management Act of 1862, *ante*, and see s. 68 of the Act of 1862, *note*.

(k) This includes cleaning, levelling, and cementing the bottom of a pool into which the effluent from sewage works flows. *Walsby v. L. Bd.*, 11 L. J. (Exch. Div.), 82 Ch. D. 421. See also *Clouston v. L. C. v. Firth*, 62 J. P. 605.

See *Jones v. County Water Supply Bd.*, [1893] 2 Ch. 603.

(l) As to sanitary conveniences used in common and for further provisions as to privies, waterclosets, etc., see the Public Health Act, 1890, *post*, p. 605.

(a) The local authority cannot lay down a general rule: *Tinkler v. Wandsworth District Bd.*, 11 W. L. R. 2 De G. & J. 201; 47 L. J. Ch. 412; followed in *Ward v. Water Corporation* (1899), 1 Q. B. 463, where it was held that the local authority had no power to prescribe a particular kind of watercloset. See also *Ross v. S. Water & Gas Corporation* (No. 1), 78 L. T. 194. If the owner has executed some works, the local authority must be prepared to prove their insufficiency by evidence: *Pearson v. S. Water & Gas Corporation* (No. 2) (1899), 1 Q. B. 761. See *Vestry of St. Luke v. Lewis*, 31 L. J. M. C. 33, but they may order the conversion of an insufficient privy into a watercloset: *Nichol v. Epping U. D. C.* (1899), 1 Ch. 844. It is not necessary that there should be separate accommodation for each house: *Griffin v. Guardians v. Pinnering*, 4 Q. B. D. 349.

(j) See notes to last section.

(p) See s. 213.

37. *As to earthclosets.*—Any enactment in force within the district of any local authority requiring the construction of a watercloset shall be deemed to be satisfied by the construction, with the approval of the local authority, of an earthcloset.

Any local authority may, as respects any house in which any earthcloset is in use with their approval, dispense with the supply of water required by any contract or enactment to be furnished to any watercloset in such house, on such terms as may be agreed on between such authority and the person providing or required to provide such supply of water.

Any local authority may themselves undertake or contract with any person to undertake a supply of dry earth or other deodorising substance to any house within their district for the purpose of any earthcloset.

In this Act the term "earthcloset" includes any place for the reception and deodorisation of fæcal matter constructed to the satisfaction of the local authority.

38. (g) [*Privies in factories.*]

39. *Public necessities.*—Any urban authority may, if they think fit, provide and maintain, in proper and convenient situations, urinals, waterclosets, earthclosets, privies, and ashpits, and other similar conveniences for public accommodation. (r)

40. *Drains, privies, etc., to be properly kept.*—Every local authority shall provide that all drains, waterclosets, earthclosets, privies, ashpits, and cesspools within their district be constructed and kept so as not to be a nuisance or injurious to health.

41. *Examination of drains, privies, etc., on complaint of nuisance.*—On the written application of any person to a local authority, stating that any drain, watercloset, earthcloset, privy, ashpit, or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), (s) the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistance, and cause the ground to be opened, and examine such drain, watercloset, earthcloset, privy, ashpit, or cesspool.

If the drain, watercloset, earthcloset, privy, ashpit, or cesspool on examination is found to be in a proper condition, he shall cause the ground to be closed, and any damage done to be made good as soon as can be, and the expenses of the work shall be defrayed by the local authority.

If the drain, watercloset, earthcloset, privy, ashpit, or cesspool on examination appear to be in bad condition, or to require alteration or amendment, (t) the local authority shall forthwith cause notice to be given to the owner or occupier (u) of the premises requiring him forthwith, or within a reasonable time therein specified,

(g) This section does not apply in a district where s. 22 of the Public Health Act, 1890, is in force. The provision of sanitary conveniences in factories and workshops is now provided for by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 9.

(r) *Vernon v. St. James's Vestry*, 16 Ch. D. 449; *Sellors v. Matlock Bath L. Bd.*, 14 Q. B. D. 928, as to nuisance; *Baird v. Tunbridge Wells*, [1894] 2 Q. B. 867, as to underground sanitary conveniences. Where an urban sanitary authority select a site as a proper and convenient situation for a urinal, then, in the absence of *mala fides*, and assuming that no case of nuisance is made out, the onus lies on the persons objecting to that particular site to show that it is not a proper and convenient situation, and for this purpose evidence that there are other situations more proper and more convenient is irrelevant: *Pethick v. Mayor of Portsmouth*, 42 W. R. 246. *Quære* whether in such case the decision of the authority is not conclusive: *Ib.*; *Mason v. Wallasey L. Bd.*, 42 W. R. 246 n. See also *Leyman v. Hessle U. D. C.* (1903), 67 J. P. 56; *Mayo v. Seaton U. D. C.* (1904), 68 J. P. 7.

(s) This section applies to every case where the fact that a drain is in bad condition or requires alteration and amendment, causes the drain to be a nuisance or injurious to health: *Southwold Corporation v. Crowdy* (1903), 67 J. P. 278.

(t) It would seem that these words do not refer to structural alteration; see *per Kennedy, J.*, in *Fulham Vestry v. Solomon* (1896), 1 Q. B. 198 at p. 201, a case under ss. 40 and 41 of the P. H. (London) Act, 1891.

(u) As to notices, see *Lancaster v. Barnes U. D. C.* (1898), 1 Q. B. 855.

to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding 10*s.* for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses. *ac*

PART IV.

LOCAL GOVERNMENT PROVISIONS.

HIGHWAYS AND STREETS.

As to Highways. (x)

144. Powers of surveyors of highways and of vestries under 5 & 6 Will. IV. c. 50, vested in urban authority.—Every urban authority shall within their district exclusively of any other person execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be consistent with the provisions of this Act; every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act, 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district. *(y)*

All ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint. *(z)*

Regulation of Streets and Buildings. (a)

149. Vesting of streets, &c., in urban authority. (b)—All streets, being or which at any time become highways repairable by the inhabitants at large within any urban

(c) See *Hargreaves v. Taylor*, 32 L. J. M. C. 111, as to power to determine nature and extent of works; and see also Public Health Act, 1890, s. 19, which is an adoptive Act.

(x) See Local Government Act, 1891, s. 25.

(y) By this section the urban authority is placed in the position of surveyor of highways, and also in the position of the parish itself, under the provisions of 5 & 6 Will. IV. c. 50. The surveyor appointed by the urban authority is in the same position as the district surveyor of a highway board, by 25 & 26 Viet. c. 61, s. 16. But there is nothing in this Act to make the urban authority liable to indictment for non-repair of a highway in the same sense as that in which the parish or other person liable *ratam tenore* was liable: *H. v. Pinner (Mayor of)*, 19 Q. B. D. 602. But see the Highway Act, 1878, s. 10, under which an indictment will lie. *R. v. Walsfield (Mayor of)*, 20 Q. B. D. 810. Whether the urban authority become surveyors of highways under this section or under a local Act, the result is the same; the period of limitation in an action against the urban authority will be three months under s. 149 of the Highway Act, 5 & 6 Will. IV. c. 50, not six months under Public Authorities Protection Act, 1893: *Griffin v. Verney (Mayor of)*, [1893] 1 Q. B. 613. See s. 96 of the Metropolitan Management Act, 1855.

As to the liability of a local board for damage to houses caused by their raising a road which had sunk, and which was vested in them as surveyors of highways: *Hargess v. Northwick L. Bd.*, 6 Q. B. D. 261.

As to the consent of the ratepayers to a rate above the maximum, as provided by 5 & 6 Will. IV. c. 50, s. 29, *Dyson v. Greet and Ld.*, 13 Q. B. D. 944.

(z) This provision does not empower a local board to pay the charges of a solicitor employed by an urban authority to conduct proceedings at the instance of an individual for stopping up or diverting a highway under ss. 81 and 85 of the Highway Act, 5 & 6 Will. IV. c. 50. *United Land Co. v. Tottenham L. Bd.*, 18 Q. B. D. 646.

As to roads, &c., see ante, Chap. XXII.

(b) As to the effect of this section on private Acts, see s. 340, *post*, and *Anderson-Lowe Corporation v. Puck* (1888), 1 Q. B. 4, followed in *Lodge v. Hetherell* (1898), 1 Q. B. 859.

district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest (c) in and be under the control of the urban authority. (d)

The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired, as occasion may require; (e) they may from time to time cause the soil of any street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers. (f)

Any person who without the consent of the urban authority wilfully displaces or takes up or who injures the pavement, stones, materials, fences, or posts of, or the trees in, any such street, shall be liable to a penalty not exceeding £5, and to a further penalty not exceeding 5s. for every square foot of pavement, stones, or other materials so displaced, taken up, or injured; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the Court may award. (g)

150. (h) Power to compel paving, etc., of private streets.—Where any street (i)

(c) This means that property in something passes, and the word "street" means so much of the soil and the air above as is required for the purposes of the street: *Finchley Electric Light Co. v. Finchley Urban District Council* (1903), 1 Ch. 437. This section, however, does not vest the subsoil, so as to enable an urban authority to excavate the soil and erect lavatories below the surface of a street which had vested in them: *Mayor of Tunbridge Wells v. Baird* (1896), A. C. 434, followed in *St. Mary, Battersea, Vestry v. County of London, etc., Electric Lighting Co.* (1899), 1 Ch. 474; See also *Poplar Borough Council v. Millwall Dock Co.*, 63 J. P. 339; *Wednesbury Corporation v. Lodge Holes Colliery Co.* (1905), 2 K. B. 823; *Salt Union v. Harvey* (1897), 61 J. P. 375.

(d) It was held that s. 68 of the Public Health Act, 1848, only gave a discretionary power to the urban authority to place and keep in repair fences, etc., but did not impose on them any absolute duty to do so: *Wilson v. Mayor of Halifax*, L. R. 3 Ex. 114. See *Borough of Bathurst v. Macpherson*, 4 Ap. Ca. 256, explained in *Lambert v. Lowestoft Corporation* (1901), 1 K. B. 590; and see *Burgess v. Northwich L. Bd.*, in notes to s. 144.

As to the highways repairable by the inhabitants at large, see *Coverdale v. Charlton*, 4 Q. B. D. 104; and see *Bagshaw v. Buxton L. Bd.*, 1 Ch. D. 220; *Taylor v. Corporation of Oldham*, 4 Ch. D. 395. As to property reverting to the owner of the soil, *Rolls v. St. George's, Southwark*, L. R. 14 Ch. D. 785 (approved by Halsbury, C., in *Mayor of Tunbridge Wells v. Baird*, *supra*). See *Burgess v. Northwich L. Bd.*, L. R. 6 Q. B. D. 264. See s. 27 of the Highway Act, 1878, 41 & 42 Vict. c. 77.

(e) As to land adjoining the road, e.g. open space in front of an inn which has remained undistinguished from the road for a long period of time, see *Sellers v. Matlock Bath (L. Bd.)*, 14 Q. B. D. 928.

(f) A highway authority, which was also the water authority, is not liable for injuries occasioned by the natural wearing away of the road causing the cover of a water valve to project above the road: *Steele v. Dartford*, 60 L. J. Q. B. 256; *Thompson v. Mayor of Brighton*, [1894] 1 Q. B. 332; *Cowley v. Newmarket L. Bd.*, [1892] A. C. 345, followed in *Robinson v. Mayor of Workington* (1897), 1 Q. B. 619. Nor where a water company own a fire plug and an accident occurs from the same cause is the company liable: *Moore v. Lambeth Water Co.*, 17 Q. B. D. 462. But where the apparatus is out of repair the company is liable: *Chapman v. Fylde Water Co.*, [1894] 2 Q. B. 599. See also *Clements v. Tyrone County Council* (1905), 2 L. R. 542; *Maguire v. Liverpool Corp.* (1905), 1 K. B. 767.

(g) As to the erection of standards, etc., in a roadway, see *Escott v. Newport Corp.* (1904), 2 K. B. 369.

(h) Ss. 150, 151, and 152 of this Act do not apply to any district in which the Private Street Works Act, 1892, is in force. The provisions of this Act should be consulted, if it is in force in the reader's district.

See s. 11 of the Public Health Act, 1890, *post*, as to when a street is deemed to be paved.

(i) Street.—An urban authority is not empowered by this section to make new streets and charge the owners of adjoining lands with the expenses: *Kingston upon-Hull v. Jones*, 1 H. & N. 489. But the owners of property adjoining land which comes within the definition of the word "street" may be required to pave and do other works, although the ground is private property and has never been dedicated to the public: *St. Mary, Islington (Vestry) v. Barrett*, L. R. 9 Q. B. 278 (decided under Metropolitan Management Act, 1855, s. 105, *ante*, p. 582; *Midland Railway v. Watton*, 17 Q. B. D. 30. As to what is a street: A road which was not a highway before the Highway Act, 1835, but which has since become a highway, but not repairable by the inhabitants at large, none of the formalities of the Act of 1835 having been complied with, is a street: *Fenwick v. Croydon R. S. A.*, [1891] 2 Q. B. 216. See *Seabrook v. Grays Thurrock L. Bd.*, 8 T. L. R. 19. As to a private alley or court, *Jowett*

within any urban district (not being a highway &c. repairable by the inhabitants at large) or the carriageway, footway, or any other part (l) of such street is not sewered, (m) levelled, paved, metalled, flagged, channelled, and made good or is not fitted to the satisfaction of the urban authority, (n) such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on (p) such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice. (q)

Before giving such notice the urban authority shall cause plans and sections of any structural works intended to be executed under this section, and an estimate of

v. *The L. Bd.*, 57 L. T. 928. A passage forming a *cul de sac* may be a street: *Walthamstow L. D. C. v. Smith* (1901), 68 J. P. 509.

Where strips of land are added alongside an old footpath repairable by the inhabitants at large, the frontages are chargeable with the expense of paving, etc., the whole street, not merely the added strips: *Fraser v. Newport L. S. A.*, 21 Q. B. D. 261; *Richards v. Keen*, 57 L. J. M. C. 48, where the added strips alone were charged for; *Wheat v. St. Giles, Camberwell*, [1892] 1 Q. B. 1; *Derby (Mayor of) v. Grange*, [1894] 1 Q. B. 435.

(k) *Highway*.—See *Fraser v. Newport L. S. A.*, (1891), 2 Q. B. 216, *supra*; *Seabrook v. Gurney Thorne L. Bd.*, 8 T. L. R. 19, *supra*; *Fraser v. Newport L. S. A.*, *supra*. As to what is not a highway, see *Leicester v. Alcock*, 2 L. T. 726; *Washington v. White*, 10 C. B. N. S. 128; *Wheat v. St. Giles*, 13 C. B. N. S. 865.

(l) As to the meaning of "part," see *Walthamstow L. S. A. v. Miller* (1880), 5 C. P. D. 218.

(m) See note (q), *infra*.

(n) As to whether there may be a legal presumption that a street has been sewered to the satisfaction of the local authority, see *Hill v. Ince* (1897), 2 Ch. 438.

(o) As to the meaning of the term "owner," see *Mead v. Bulby, &c.*, 1 D. C. (1903), 21 T. L. R. 8.

(p) *Abutting, &c.*—As to when premises adjoin or abut on, etc., see *Newport L. S. v. Graham*, 9 Q. B. D. 183; *Lighthouse v. Hetherington L. Bd.*, 16 Q. B. D. 177.

(q) As to general object of this section, see *Kington-upon-Hell L. Bd. v. Jones*, *supra*. The power as to sewers conferred by the section can only be exercised once for all when the street is first sewered, etc.: *Lea v. Trevelyan L. Bd.*, 20 Q. B. D. 63; *Harvey L. Bd. v. Jones*, [1890] 1 Q. B. 736; *Hill v. Ince* (1897), 2 Ch. 442 n.; *Ridham v. Harford Corporation* (1898), 1 Q. B. 231. An urban authority has no power under this section to apportion any part of the expenses upon the owners of premises outside their district: *Harrow v. Portland L. S. Society* (1906), 22 T. L. R. 346. But this is not so with regard to paving and channeling: *Barry and Chaberton L. Bd. v. Pann*, [1895] 2 Q. B. 110. See also *St. George's Hill v. Fulkam Vestry* (1900), 2 Q. B. 183, distinguishing *Bondella v. Trevelyan*, *supra*; *Robertson v. Bristol Corporation* (1900), 2 Q. B. 198; *Stratford L. D. C. v. Manchester South Junction and Altricham Ry. Co.*, 68 J. P. 59; *Carston v. Brimley L. D. C.* (1904), 17 T. L. R. 25.

Owners cannot be required to raise the street to the level of other streets: *Cary v. Hull L. Bd.*, 31 L. J. M. C. 7; but cf. the Private Street Works Act, 1892, s. 9 (1), which was apparently passed to meet this case, in districts where the Act has been adopted.

A notice with footnote that particulars of the works could be obtained at the office was held good: *Dayle v. Walsden*, 83 L. J. M. C. 161. A notice in part *ultra vires* can be enforced as to the part which is valid: *Hall v. Potter*, 21 L. T. N. S. 454. But the expenses cannot be recovered without proof of the preliminary notice: *Jarrow L. Bd. v. Kennedy*, 1 L. R. 6 Q. B. 128; *Fraser v. L. Bd.*, v. *Compton*, 31 W. R. 834; and it is bad if it do not sufficiently specify the works: *Blackburn (Mayor of) v. Parkinson*, 11 L. & B. 71. As to an urban authority being estopped by the terms of a notice, see *Good v. Baccup L. Bd.*, 59 L. J. M. C. 44.

Authority gave notice requiring paving with concrete, then did the work themselves without concrete; held they could nevertheless recover: *Atton L. Bd. v. Levey*, 11 A. C. 93; *Kershaw v. Sheffield Corporation*, 1 J. P. 40. As to the effect of including certain works which cannot legally be included in notice, see *Manchester (Mayor of) v. Hampson*, 35 W. R. 331, 591.

As to the finding of fact by justices that a road is a street within this section, see *Mauls v. London L. Bd.*, 10 Q. B. D. 374; questioned in *Corporation of Portsmouth v. Smith*, 13 Q. B. D. 181. And see *B. v. Skel*, 60 L. T. 560; and compare *Jones v. Wye*, 51 L. T. 237.

A notice to pave and a notice of apportionment are not, but a demand of payment is, a "decision" within the terms of s. 268, from which an appeal will lie by memorial to the Local Government Board. *Reg. v. Local Government Bd.*, 10 Q. B. D. 33. See also *Hanwell L. D. C. v. Smith*, 68 J. P. 496. As to the solution of questions which may arise when property in respect of which a notice has been served under this section is put up for sale, see *In re Leyland and Taylor's Contract* (1900), 2 Ch. 625.

the probable cost thereof, to be made under the direction of their surveyor, such plans and sections to be on a scale of not less than one inch for 88 ft. for a horizontal plan, and on a scale of not less than one inch for 10 ft. for a vertical section, and, in the case of a sewer, showing the depth of such sewer below the surface of the ground; such plans, sections, and estimate shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection of all persons interested therein during the time specified in such notice; and a reference to such plans and sections in such notice shall be sufficient without requiring any copy of such plans and sections to be annexed to such notice.

If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein, (r) and may recover in a summary manner (s) the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled (t) by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or

the urban authority may by order declare the expenses so incurred to be private improvement expenses. (u)

(r) If the notice is not complied with, it is not necessary for the urban authority to issue a fresh notice specifying the particular works required, before it proceeds to do the works: *Simcox v. Handsworth L. Bd.*, 8 Q. B. D. 39.

(s) Although the summary remedy may be lost by negligence, the charge imposed by s. 257 still continues: *Sunderland Corporation v. Alcock*, 51 L. J. Ch. 546. In proceedings before the justices the owner may dispute his liability by showing that the road is not a "street" or that it is a "highway": *Eccles v. Wirrell R. S. A.*, 17 Q. B. D. 107; and see under the Metropolis Management Acts, *R. v. Marsham*, [1892] 1 Q. B. 371.

(t) Where a local Act provided that the apportionment of expenses was to be ascertained and settled by the corporation, it was held that the correction of it by the surveyor of the corporation after it had been approved by the corporation did not invalidate it: *Mayor of St. Helens v. Riley*, 47 J. P. 471.

Any dispute arising on the apportionment, whether as to amount or otherwise, must be dealt with by arbitration in manner provided by the Act (ss. 179-181), and the urban authority cannot proceed to recover the amount apportioned from any owner who has given notice that he disputes the apportionment: *Sandgate (Dist. L. Bd. of Health) v. Keene*, [1892] 1 Q. B. 831. But a dispute as to the prime cost is not a dispute as to the apportionment: *Folkestone (Mayor of) v. Brooks*, [1893] 3 Ch. 22; followed in *West Hartlepool (Mayor) v. Robinson*, 77 L. T. 387. See also *Acton U. D. C. v. Watts*, 67 J. P. 400; *Hornsey Corp. v. Birkbeck Land Soc.* (1906), 1 K. B. 521.

As to including in the apportionment an estimated sum in respect of legal and other expenses, see *Walthamstow L. Bd. v. Staines*, [1891] 2 Ch. 606. Where works are done by the board with borrowed money and the instalments on the frontagers charge a higher rate of interest than the board pay, the apportionment is good: *North British Ry. Co. v. Holme Cultram L. Bd.*, 54 J. P. 86.

(u) The apportionment should be according to the frontage of the premises of each owner, irrespective of the width of the street, and whether their premises have access to it or not: *Reg. v. Newport L. Bd.*, 3 B. & S. 341. But a claim from the owners of property on one side which required the work has been held to be a good apportionment: *Wakefield Urban Authority v. Mander*, 5 C. P. D. 248; but compare *Whitchurch v. Fulham Bd.*, L. R. 1 Q. B. 233; *Mile End Vestry v. Whitechapel Union*, 1 Q. B. D. 680, decided under the Metropolis Management Acts and directly to the contrary, *ante*, p. 582. Upon the true construction of this section the expenses of the local authority do not become a charge on the premises until the completion of the works: *In re Allen and Driscoll's Contract* (1904), 2 Ch. 226; see *Stock v. Meakin* (1900), 1 Ch. 683.

The owner of the property at the time the work is done, not when the notice is given, is the person liable: *Hinton v. Swindon Bd.*, 4 Q. B. D. 305. These expenses may by s. 257 be charged upon the premises by annual instalments for not more than thirty years, *post*, p. 632. See *Tottenham L. Bd. v. Rowell*, 1 Ex. D. 514; *ib.*, 15 Ch. D. 378.

If the urban authority proceed to recover summarily, see s. 251; if by arbitration, see ss. 179-181. As to an award not being binding on any frontager not a party to the arbitration and who has not had notice of it, see *Tunbridge Wells L. Bd. v. Ackroyd*, 5 Ex. D. 199.

As to estoppel by decision of justices, see *Reg. v. Hutchins*, 6 Q. B. D. 300.

See *Barnmouth Commissioners v. Watts*, 14 Q. B. D. 87, as to the liability for proportion of expenses of sewerage and paving, although the contract for the work was not under seal.

Where part only of the work was executed on a street, the urban authority was held to have authority to fix the sum to be apportioned, and the magistrate to have jurisdiction to entertain the complaint and to make the order for payment. It was also held that if the frontager was

The same proceeding may be taken, and the same powers may be exercised, in respect of any street or road of which a part is or may be a public footpath, or repairable by the inhabitants at large, as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large. (c)

151. [*Exemption of incumbent of church from expenses.*] (x)

152. (y) *Power to declare private streets when sewered, &c., to be highways.*—

When any street within any urban district not being a highway repairable by the inhabitants at large has been sewered, levelled, paved, flagged, metalled, channelled, and made good, and provided with proper means of lighting to the satisfaction of the urban authority, such authority may, if they think fit, by notice in writing put up in any part of the street, declare the same to be a highway, and thereupon the same shall become a highway repairable by the inhabitants at large; and every such notice shall be entered among the proceedings of the urban authority.

Provided that no such street shall become a highway so repairable, if within one month after such notice has been put up the proprietor or the majority in number of proprietors of such street, by notice in writing to the urban authority, object thereto, and in ascertaining such majority joint proprietors shall be reckoned as one proprietor. (z)

154. *Power to purchase premises for improvement of streets.*—Any urban authority may purchase any premises for the purpose of widening, opening, enlarging, or otherwise improving any street, or (with the sanction of the Local Government Board) for the purpose of making any new street. (a)

155. (b) *Power to regulate line of buildings.*—When any house or building situated in any street in an urban district, or the front thereof, has been taken down, (c)

aggrieved, his only remedy was to appeal to the Local Government Board under s. 268 of this Act. *Wicks v. Mayor of Sheffield*, 12 Q. B. D. 112; *Derby (Mayor of) v. Gledyngs*, [1894] 2 Q. B. 496.

(d) The mere setting out of an intended road is not such an irrevocable act as that the person who did it, and allowed the public to traverse and use the road, is to be held to have dedicated the same to the public. *Hul v. Corporation of Leeds*, 44 L. J. 873. See note to the word "street" in a. 150, ante. As to the effect of a covenant in a deed by which one landowner is not to be under any liability to contribute to the maintenance or repair of a road which was to be maintained by the other landowner until taken over by the local authority, see *Mare v. Todd* (1890), 67 J. P. 238; 68 J. P. 43; *Saunders v. Birrell*, 69 J. P. 89.

(e) This section does not apply to districts where the Private Street Works Act, 1892, is in force; see s. 25 of that Act.

(f) This section is repealed as to districts where Part III. of the Public Health Act, 1890, is adopted by the local authority, and s. 41 of that Act is substituted therefor. And this section does not apply to districts where the Private Street Works Act, 1892, is in force; see s. 25 of that Act.

(g) See note to paragraph 1 of s. 144, ante, as to the adoption of roads under the provisions of the Highway Act, 1835. But under this section a highway dedicated to the public must, in order to vest in an urban authority, be used and adopted by the public. *Musket v. Horne Bay, &c.*, 50 L. T. N. S. 222.

See s. 147 as to the powers to agree as to making of new public roads; and *Reg. v. Doncaster L. Bd.*, 4 B. & S. 138, as to power not to make new road to the satisfaction of urban authority; and *Wicks v. Mayor of Sheffield*, 12 L. J. Q. B. 86, as to requiring the owners of property adjoining street to do the work under s. 149.

Ss. 149 and 152 are not retrospective. *Att.-Gen. v. Barker*, 47 J. P. 263, q.v. as to the works necessary precedent to declaration as a highway.

Opening a road does not answer the requirements of this section that the road be paved, and as to widening pavement, *Att.-Gen. v. Barker, supra*.

Local authorities cannot choose which of the works mentioned in s. 152 they will have done. Their discretion is limited to their being satisfied with the efficacy of each description of work when done: *Att.-Gen. v. Barker, supra*.

No express power is given by the Act to the urban authority to make new streets, but this provision clearly implies the possession of that power. See *Fryer v. London Health A. A.*, 1873.

See Public Health (Buildings) Act, 1894, which has a very important bearing on this section.

If a substantial portion be left undestroyed, the house has not been taken down.

in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith. (*d*)

The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in the manner provided by this Act. (*e*)

156. [*Repealed by the Public Health (Buildings in Streets) Act, 1888.*]

157. *Power to make byelaws respecting new buildings, etc.*—Every urban authority (*f*) may make byelaws (*g*) with respect to the following matters; (that is to say,) (*h*)

- (1) With respect to the level, width, (*i*) and construction of new streets, (*j*) and the provisions for the sewerage thereof:

Att.-Gen. v. Hatch, [1893] 3 Ch. 36. See *Newhaven L. Bd. v. Newhaven School Bd.*, 30 Ch. D. 350; *Sutton L. Bd. v. Hoare*, 10 T. L. R. 586. A building destroyed by fire would not be "taken down" within the meaning of this section.

(*d*) See the London Building Act, 1894, *ante*, p. 475; *Yabbicom v. Bristol Brewery Co.*, 67 J. P. 261.

(*e*) See *Masters v. Pontypool Bd.*, 9 Ch. D. 677; following *Slee v. Mayor, etc., of Bradford*, 8 L. T. N. S. 491, as to local authority having no power to interfere after plan approved.

The insertion of the words "or the front thereof" will apply to the case where one half of the house was taken down and rebuilt first, and then the other half.

It has been held that a court of equity has no jurisdiction to restrain proceedings to recover a penalty for building beyond the frontage line: *Kerr v. Corporation of Preston*, 6 Ch. D. 463.

(*f*) As to the powers of the urban authorities, see *Baker v. Mayor, etc., of Portsmouth*, 3 Ex. D. 157; *Hendon Local Board v. Pounce*, 42 Ch. D. 602.

(*g*) The Local Government Board have issued two model codes of building byelaws, the one for use in urban districts, and the other (with limited provisions) applicable to rural districts. These codes are well explained in the *Encyclopedia of Local Government Law*, Vol. II., at p. 55.

The Crown is not expressly or impliedly bound by this Act, nor by byelaws made under it, *Gorton L. Bd. v. Prison Commissioners* (1887), *rep.* (1904), 2 K. B. 165 (n.).

As to railways, see s. 157, *post*. Certain other buildings are generally excluded from the model forms of byelaws. As to the exemption of buildings used for the working of a mine, see *Tylecote v. Morton*, 66 J. P. 136. See also *Linzell v. Felirstone U. D. C.*, 68 J. P. 208; *Briarley v. Harper* (1900), L. G. C. 321; *Salt v. Scott-Hall* (1903), 2 K. B. 245; *Pomeroy v. Malvern U. D. C.*, 67 J. P. 375.

(*h*) This section is extended by s. 23 of the Public Health Act, 1890.

(*i*) A byelaw made by an urban authority under this section provided that every new street should be laid out and formed of such width and at such level as the urban authority should in each case determine. It was held by the House of Lords that "width" in this section, and in the byelaw, means width of roadway, and not width between houses on each side of the street, and that the urban authority could not under that byelaw disapprove of and pull down houses in the course of erection in a new street on the ground that the building line was too near the roadway: *Robinson v. L. Bd. of Barton Eccles*, 8 Ap. Ca. 798. A byelaw that every person who shall construct a new street shall provide at one end at least an entrance of the width of such street is *intra vires* and valid: *Hendon L. Bd. v. Pounce*, 42 Ch. D. 602. A byelaw that every street shall be 30 ft. wide is valid: *Roberts v. Richards*, 54 J. P. 693. As to the meaning in a byelaw under this subsection of the words "person who lays out a street," see *Sunderland Corporation v. Brown*, 48 L. T. 478; *St. George's L. Bd. v. Ballard*, [1895] 1 Q. B. 702. See also *Devonport (Mayor of) v. Tozer*, 18 T. L. R. 489.

(*j*) "Construction" of a new street includes building of houses abutting on it: *Hendon L. Bd. v. Pounce*, 42 Ch. D. 602; but see *Gozzett v. Maldon U. S. A.*, [1894] 1 Q. B. 327.

These words "new streets" are not confined to streets constructed for the first time, but apply also to an old highway, formerly a country lane, which has long been a "street" within the interpretation clause (s. 4) of the Act, and which by the building of houses on each side of it has recently become a street in the popular sense of the term: *Robinson v. L. Bd. of Barton Eccles*, 8 Ap. Ca. 798; and see *Williams v. Powning*, 48 L. T. 672; *St. George's L. Bd. v. Ballard*, *supra*.

The section does not empower the making of a byelaw that "no person shall commence the erection of a building in a new street unless and until the kerb of each footpath therein

- (2) With respect to the structure of walls, foundations, roofs, and chimneys of new buildings, (k) for securing stability and the prevention of fires, (l) and for purposes of health;
- (3) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; (m)
- (9) With respect to the drainage of buildings, (n) to waterclosets, earthclosets, privies, and pits, (o) and to cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, (p) and to prohibition of their use to such habitation.

And they may further provide for the observance of such byelaws by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans (q) and sections by persons intending to lay out streets or to construct buildings, (r) as to inspection by the urban authority, and

shall have been put in at such level as may be fixed or approved by the urban sanitary authority: *Ridwell v. Mayor, etc., of Sunderland*, 33 W. R. 164.

It has been held that a person who, under a contract with a building owner, built along a line of street laid out by such owner, is not "a person who lays out a new street" within a byelaw; see *Mayor, etc., of Sunderland v. Brown*, 43 L. T. N. S. 478. As to application of byelaws to "passages" leading to backs of houses, see *Reg. v. Goble L. Bd.*, [1891] 2 Q. B. 212.

(4) As to an urban authority having no power to make byelaws with respect to old buildings, see *Parker v. Bees*, 7 Jur. N. S. 629; *Hargess v. Pencock*, 16 C. B. N. S. 621. As to the meaning of building, see the following cases: *South London Sea Corporation v. Atter*, 70 L. J. K. B. 328; *South London Sea Corporation (b.)*; *Colfield R. D. C. v. Greenbank Water Co.* (1899), 2 Q. B. 641; *South Shields Corporation v. Wilson Bros.*, 65 J. P. 294; *Leitch v. Feltham and Walton F. D. C.*, 68 J. P. 208; *Hubbard v. Bromley R. D. C.*, 69 J. P. 477; *Hate v. Sunderland Corporation*, 67 J. P. 199.

(5) As to byelaws relating to incombustible materials, see *Bailey v. Cuckfield R. D. C.*, 59 J. P. 582; *Hendon F. D. C. v. Martin*, *Times*, January 13, 1900.

(6) A highway cannot be counted as part of the open space required by a byelaw; *Jones v. Perry*, 57 L. T. 422.

The local authority may pull down a building contravening a byelaw as to open spaces, and is not liable for damage caused thereby; *Jagger v. Doncaster R. S. A.*, 54 J. P. 438.

A byelaw required a minimum open space to be left, and that any open space left in rear of a building should not subsequently be built on without sanction of authority; the latter half is invalid: *Quibby v. Liverpool Corporation (b)*, 53 J. P. 213. See also *Adams v. Bromley L. Bd.*, 37 J. P. 2; *Aderton v. Birkenhead Commissioners*, 9 Jur. N. S. 1058.

(a) A byelaw requiring every main drain or other drain to be trapped was held to necessitate a trap in each separate line or drain of a block of houses: *Bluebell v. Price* (1898), L. G. C. 512. Byelaws may be made for the provision of separate drains for surface and sewage water: *Wheatley v. Str. Acc.* (1901), 2 K. B. 540. A byelaw of a R. D. C. requiring a cesspool to be 50 ft. from a dwelling-house was held to be valid: *Simmons v. Heston R. D. C.* (1897), 2 Q. B. 433. See also as to byelaws under this subsection, *Butt v. Tottenham F. D. C.*, 62 J. P. 443; *Pakeham v. Titchhurst R. D. C.*, 67 J. P. 418. As to floors made of steel and timber, see *Towers v. Brown* (1903), 2 L. G. R. 912.

(4) A byelaw that no dwelling-house shall be erected without having at the rear or side a sufficient roadway, for the purpose of affording efficient means of access to the privy or ashpit belonging to the house, was held not to be valid: *Waste v. Garsden L. Bd.*, L. R. 344, B. 5.

(p) A byelaw that no new house shall be occupied till certified to be fit for human habitation, is reasonable and valid: *Hornell v. Seinfeld*, 58 L. T. 732; and see *Gowers v. Seely & Co.*, 68 J. P. 481.

(q) A byelaw giving power to a corporation to approve or disapprove of plans of proposed new buildings has been held to be not unreasonable where, by the special legislation under which it is made, power to appeal to quarter sessions is conferred on the building owner: *Cook v. Hainsworth* (1896), 2 Q. B. 85.

A local authority refused to approve plans unless the owner would undertake to construct at his own expense the sewers with which the drains were intended to communicate, and also the necessary main street sewer. It was held that they were not entitled to attach any such condition to their consent and a *mandamus* went to compel them to give consent: *Reg. v. Titchmarsh R. D. C.* (1896), 2 Q. B. 451. But see *Smith v. Chorley R. D. C.* (1897), 1 Q. B. 678; followed in *Reg. v. Farnley & Corporation*, 61 J. P. 721.

As to a byelaw enabling the authority to retain plans deposited, see *Greening v. Lymington L. Bd.*, 1 Cab. & El. 329. See, further, notes to s. 178, *post*.

(r) As to notice given and intention afterwards abandoned, see *Sunderland v. Skinner*, 53 J. P. 660.

As to who falls within the meaning of the words "person erecting the buildings" in a byelaw enabling the authority to retain plans deposited, see *Greening v. Lymington L. Bd.*, 1 Cab. & El. 329. See, further, notes to s. 178, *post*.

The question is the exclusive jurisdiction as to whether a house is a "new building" within the

as to the power of such authority (subject to the provisions of this Act) to remove, alter, or pull down any work begun or done in contravention of such byelaws:

Provided that no byelaw made under this section shall affect

any building erected in any place (which at the time of the passing of this Act is included in an urban sanitary district) before the Local Government Acts came into force in such place, or

any building erected in any place (which at the time of the passing of this Act is not included in an urban sanitary district) before such place becomes constituted or included in an urban district, or by virtue of any order of the Local Government Board subject to this enactment. (s)

The provisions of this section and of the two last preceding sections shall not apply to buildings belonging to any railway company and used for the purposes of such railway under any Act of Parliament. (t)

158. (u) *As to commencement of works and removal of works made contrary to byelaws.*—Where a notice, plan, (x) or description of any work is required by any byelaw made by an urban authority to be laid before that authority, the urban authority shall, within one month after the same has been delivered or sent to their surveyor or clerk, signify in writing their approval or disapproval (y) of the intended work to the person proposing to execute the same; and if the work is commenced after such notice (z) of disapproval or before the expiration of such month without such approval, and is in any respect not in conformity with any byelaw of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed. (a)

Where an urban authority incur expenses in or about the removal of any work executed contrary to any byelaw, such authority may recover in a summary manner the amount of such expenses either from the person executing the

meaning of a byelaw: *James v. Wyrrill* (or *Wyrill*), 51 L. T. 237. See same case as to double penalties. A conservatory is not "a building": *Hibbert v. Acton L. Bd.*, 5 T. L. R. 274.

(s) Before a building is pulled down an opportunity of being heard must be given to the party offending: *Cooper v. Wandsworth Bd.*, 8 L. T. N. S. 278.

(t) See *North Kent Ry. Co. v. Badger*, 8 E. & B. 728; *M. S. and L. Ry. v. Barnsley Union*, 67 L. T. 119; and cases under s. 201 of the London Building Act, 1894.

(u) See *Newnham L. Bd. v. Newnham School Bd.*, 30 Ch. D. 350. This section is extended to the additional matters mentioned in s. 23 of the Public Health Act, 1890, by that section.

(x) A plan for a number of houses is not to be considered a plan of one building only but of several buildings: *White v. Sunderland Corporation*, 67 J. P. 199; *Harrogate Corporation v. Dickinson* (1904), 1 K. B. 468.

(y) Failure to express disapproval will prevent the authority pulling down the building or recovering penalties: *Masters v. Pontypool Bd.*, 9 Ch. D. 677; but in such circumstances an injunction might be obtained at the suit of the Att.-Gen.: *Att.-Gen. v. Ashbourne Recreation Ground Co.* (1903), 1 Ch. 101, and see *Fulford v. Blatchford*, cited in the note to s. 33 (1) of the Public Health Amendment Act, 1890, *post*.

An authority cannot refuse to approve plans because they object to the site: *R. v. Preston Corporation*, 3 T. L. R. 665, or to the class of building proposed: *R. v. Newcastle-upon-Tyne Corporation*, 53 J. P. 788. They cannot approve plans which contravene their own byelaws: *Yabbicom v. King* (1899), 1 Q. B. 444.

If the plans and proposed works are in accordance with the byelaws, a *mandamus* may be obtained to compel the authority to signify their approval. But see *Smith v. Chorley R. D. C.*, and other cases cited in the notes to s. 157, *ante*.

(z) It is sufficient if the notice refer to the numbers of byelaws infringed: *Dickinson v. Forsyth*, 68 J. P. 170.

(a) See *Banman v. St. Pancras Vestry*, L. R. 2 Q. B. 528, as to a builder obtaining approval for one building and erecting another; see *Masters v. Pontypool Bd.*, *supra*, 47 L. J. Ch. 797; *Hopkins v. Smethwick L. Bd.*, 24 Q. B. D. 712; *James v. Masters*, [1893] 1 Q. B. 355, as to notice previous to pulling down building. As to refusing sanction on the ground that the building would depreciate the character of the neighbourhood, see *Reg. v. Newcastle-on-Tyne*, 53 J. P. 788. See also *Hattersley v. Burr*, 4 H. & C. 523, as to the requirement of a month's notice before building being unreasonable.

works removed or from the person causing the works to be executed, at their discretion. (b)

Continuing offences.—Where an urban authority may under this section pull down or remove any work begun or executed in contravention of any byelaw, (c) or

where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any byelaw to a penalty,

the existence of the work during its continuance in such a form and state as to be in contravention of the byelaw shall be deemed to be a continuing offence, (d) but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the byelaw was broken. (e)

159. What to be deemed a new building.—For the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework is left down to the ground floor, or

the conversion into a dwelling-house of any building not originally constructed for human habitation, or

the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building. (f)

160. Incorporation of certain provisions of 10 & 11 Vict. c. 31.—The provisions of the Towns Improvement Clauses Act, 1847, (g) with respect to the following matters; that is to say,

(1) With respect to naming the streets and numbering the houses; and

(2) With respect to improving the line of the streets and removing obstructions; (h) and

(3) With respect to ruinous or dangerous buildings; (i) and

(4) With respect to precautions during the construction and repair of the sewers, streets, and houses,

shall for the purpose of regulating such matters in urban districts, be incorporated with this Act

Notices for alterations under sects. 69, 70, and 71, directions under sect. 73, and orders under sect. 74 of the said Towns Improvement Clauses Act, may, at the option of the urban authority, be served on owners instead of occupiers, or on owners as well as occupiers, and the cost of works done under any of these sections may, when notices have been so served on owners, be recovered from owners instead of occupiers; and when such cost is recovered from occupiers so much

(b) See s. 33 of the Public Health Act, 1890, restricting the user of buildings, described in deposited plans otherwise than as dwelling-houses, for the purposes of habitation.

(c) As where, for instance, work is done in contravention of byelaws: *Fairbairn v. Canterbury Corporation*, 67 J. P. 181.

(d) The offender is not necessarily the person guilty of the continuing offence. The person who is liable for the continuing offence is the person who actually continues it: *Per Channell, J.*, in *Wick v. Mayor, etc., of West Ham* (1900), 1 Q. B. 324.

(e) See *Marshall v. Smith*, L. R. 8 C. P. 416, decided under the Public Health Act, 1848, followed in *Reay v. Mayor of Gateshead*, 55 L. T. 92, and see *Baby, etc., v. D. C. v. Millard*, 68 J. P. 81. See also *Typhie v. J. H. etc.*, 66 J. P. 136.

(f) As to rebuilding a stable, see *Halls v. Innes*, L. R. 9 C. P. 30, under the Local Government Act, 1888; see *Fiddling v. Phil Commissioners*, 3 C. P. D. 272, as to temporary buildings for workmen employed in building works. An addition to an old building is not within the meaning of this section: *Shiel v. Mayor of Sunderland*, 6 H. & N. 796. The magistrate is the exclusive judge of whether a house is a new building, that being a question of fact: *James v. Mayor of Wynd*, 51 T. L. 247. See s. 5 of the London Building Act, 1894, ante, p. 476. In every case it is a question of fact for the justices whether an old building, exempt from the operation of the byelaws, is being so reconstructed or re-erected as to be a new building within their operation: *Redruth Ironery Co. v. Redruth T. D. C.* (1905), 69 J. P. 74. And see *Hall v. Lamborne Corporation*, 69 J. P. 809.

(g) This Act is printed with full notes in *Lambey's Public Health* (6th ed.), Vol. II. p. 957.

(h) See 66-69. As to projections in streets, see *Figgott v. Guildford*, 65 J. P. 259; *Hull v. L. C. C.* (1901), 1 K. H. 589.

(i) See s. 75.

thereof may be deducted from the rent of the premises where the work is done as is allowed in the case of private improvement rates under this Act. (k)

257. (l) *Recovery of expenses by local authority from owners.*—Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. (m)

In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. (n)

Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same. (o)

The local authority may, by order, declare any such expenses to be payable by annual instalments within a period not exceeding 30 years, with interest at a rate not exceeding £5 per centum per annum, until the whole amount is paid; and any such instalments and interest, or any part thereof, may be recovered in a summary manner from the owner or occupier for the time being of such premises, and may

(k) See also as to this section, *Usk U. D. C. v. Mortimer*, 68 J. P. 38.

(l) This section does not apply to estimated expenses, even when incorporated with a special Act empowering local authority to apportion estimated expenses: *West Ham (Mayor of) v. Grant*, 40 C. D. 331; and see *Walthamstow L. Bd. v. Staines*, [1891] 2 Ch. 606; followed in *West Hartlepool (Mayor) v. Robinson*, 77 L. T. 387. S. 150 and this section do not create the relationship of debtor and creditor between the owner and the local authority: *Re Boor, Boor v. Hopkins*, 40 C. D. 572.

(m) The charge created by this section is a charge on the property in the hands of a subsequent owner, and continues, although the local authority has by negligence lost its summary remedy under s. 257 against the previous owner: *Sunderland Corporation v. Alcock*, 51 L. J. Ch. 546. The charge attaches when the works are completed: *Hornsey L. Bd. v. Monarch Building Society*, 24 Q. B. D. 1; *Re Bettesworth and Richer*, 37 C. D. 535; *Re Boor, Boor v. Hopkins*, 40 C. D. 572. Such charge is not a "land charge" within the meaning of the Lands Charges Registration Act, 1888, *Reg. v. Vice-Registrar of Land Registry*, 24 Q. B. D. 178. See also as to the meaning of these words, *Smith's Settled Estates, In re* (1901), 1 Ch. 689; *Wealdstone U. D. C. v. Evershed*, 69 J. P. 258.

A person who is the owner of premises fronting the street at the date of the completion of the works is liable under this section to pay an apportioned part of the expenses of the works, although he was not the owner of the premises when the notice requiring the works to be executed was served under s. 150: *East Ham U. D. C. v. Aylett* (1905), 2 K. B. 22.

(n) See ss. 21, 23, 26, 36, 41, 104, 120, 150, as to the cases in which an owner of premises is made liable for expenses under this Act; and ss. 46, 69, 72 of the Waterworks Clauses Act, 1847; and s. 75 of the Tows Improvement Clauses Act. See *Corporation of Birmingham v. Baker*, 17 Ch. D. 782, as to the charge created. As to notice of demand, see *Simeoz v. Hands-worth L. Bd.*, 8 Q. B. D. 39. And as to its being a "decision" within s. 268, see *Reg. v. Local Government Bd.*, 10 Q. B. D. 309. See also *Smith's Settled Estates, In re* (1901), 1 Ch. 689.

(o) *Bradley v. Metropolitan Bd.*, 38 L. T. N. S. 849; *Tunbridge Wells Bd. v. Ackroyd*, 5 Ex. D. 199; *Derby (Mayor of) v. Grudgings*, [1894] 2 Q. B. 496, and see *ante*, p. 627, under s. 150.

As to an apportionment of street expenses being conclusive, although reasonable opportunities have not been offered of inspecting plans and estimate, see *Shanklin L. Bd. v. Miller*, 5 C. P. D. 272.

An apportionment is not necessarily bad because it includes the expenses of paving more than one street. *Ib.* Unless so disputed, apportionment is binding, and frontager cannot set up as defence that he has been charged in respect of too much frontage: *Midland Ry. Co. v. Watton*, 17 Q. B. D. 30. Where the land charged is subject to restrictive covenants the local authority is not entitled to an order for sale free from the covenants: *Tendring Union v. Dorton*, [1891] 3 Ch. 265.

be deducted from the rent of such premises, in the same proportion as are allowed in the case of private improvement rates under this Act. (j)

308. Compensation for injuries.]—Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage (q) or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of £20, the same may at the option of either party be ascertained and recovered before a court of summary jurisdiction.

(p) It appears, therefore, that in the first place, by s. 251, the cost of works of private improvement may be recovered from the owner or occupier in a summary manner; or secondly, it may be declared to be a private improvement expense, and by ss. 213, 214, the local authority may levy a private improvement rate on the occupier, who may deduct three-fourths of the rate from his rent; or thirdly, the sum may, by this section, be declared to be payable by annual instalments.

See *Portsmouth Commissioners v. Watts*, 14 Q. B. D. 87, as to the liability for proportion of expenses of sewerage and paving, although the contract for the work was not under seal.

(q) See hereon *Bridley v. Southampton L. Bd.*, 1 E. & R. 1011; *Price v. Watney L. D. Co.*, 63 J. P. 279, cited in the note to s. 16, *ante*. A person claiming compensation may insist on the amount being decided by arbitration: *Brierly Hill L. Bd. v. Pearsall*, 9 A. C. 595; *St. James and Pall Mall Electric Light Co. v. Rex*, 73 L. J. K. B. 518.

PUBLIC HEALTH (BUILDINGS IN STREETS) ACT, 1888.

51 & 52 VICT. c. 52.

An Act to amend the Public Health Acts in relation to Buildings in Streets.

[24th December, 1888.]

38 & 39 Vict. c. 55.]—Whereas the provisions of the Public Health Act, 1875, with respect to bringing forward houses or buildings in streets are defective, and it is expedient to make further provisions in relation thereto :

Be it therefore enacted, etc. :

1. *Short titles and construction.*—This Act may be cited as the Public Health (Buildings in Streets) Act, 1888, and this Act and the Public Health Act, 1875, and [here follow other Public Health Acts] may be cited together as the Public Health Acts, and this Act shall be construed as one with the Public Health Act, 1875.

2. In this Act, unless the context otherwise requires, words and expressions to which meanings are assigned by the Public Health Act, 1875, have in this Act the same respective meanings.

3. *Buildings not to be brought forward.*—S. 156 of the Public Health Act, 1875, is, save as hereinafter mentioned, hereby repealed, and in lieu thereof it is hereby enacted that it shall not be lawful in any urban district, without the written consent (a) of the urban authority, to erect or bring forward any house or building in any street, (b) or any part of such house or building, beyond the front main wall of the house or building on either side thereof (c) in the same street, (d) nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. (e)

Any person offending against this enactment shall be liable (s. 3) to a penalty not exceeding 10s. for every day during which the offence is continued after written notice in this behalf from the urban authority. (f)

(a) As to what constitutes a sufficient "written consent," see *Mullis v. Hubbard* (1903), 2 Ch. 431; *Merrett v. Charlton King's U. D. C.* 67 J. P. 419.

(b) As to the old section, see *Robinson v. Barton Local Board*, 8 A. C. 798.

A house at the corner of two streets may be in both for the purposes of this enactment: *Gilbart v. Wandsworth District Board of Works*, 60 L. T. 149; and see *Warren v. Mustard*, 61 L. J. M. C. 18.

(c) As to the meaning of these words, see *Ravensthorpe L. Bd. v. Hinchcliffe, infra*; *Anderson v. Richards* (1906), 70 J. P. 231.

(d) See *R. v. Fulwood L. Bd.*, 59 J. P. 311.

(e) The section does not apply where the building on either side is merely begun, and its walls have not been raised to any substantial height: *Ravensthorpe L. Bd. v. Hinchcliffe*, 24 Q. B. D. 168. A public institution is not a building to the line of which a building owner must conform: *Att.-Gen. v. Edwards*, [1891] 1 Ch. 194. The building must be looked at as a whole in considering what is a main front wall, etc. The section does not apply unless there is a continuous line of building: *Reg. v. Ormesby Local Board*, 43 W. R. 96; and see *Williams v. Wallasey Local Board*, 16 Q. B. D. 718, as to new buildings under the repealed section. This section creates a single new offence with a penalty attached to it, i.e. a fine on the prosecution of the local authority and a private individual (e.g. a neighbour who objects to a building being brought forward) has no cause of action: *Mullis v. Hubbard, supra*. See also *Blackpool Corporation v. Johnson* (1902), 1 K. B. 646; *Welsh v. Mayor, etc., of West Ham, ante*, p. 631. As to what happens when the justices are divided in opinion, see *Kinnis v. Graves*, 67 L. J. Q. B. 583.

(f) As to the builder's liability, see *Bauman v. St. Pancras Vestry*, L. R. 2 Q. B. 528; *Plumstead District Board of Works v. Spackman*, 10 A. C. 229. It has been held to be a

Provided that the repeal by this Act enacted shall not affect anything duly done or suffered, or any right or liability acquired, accrued, or incurred, or any security given under the section hereby repealed, or any penalty, forfeiture, or punishment incurred in respect of any offence committed against such section, or any investigation, legal proceeding, or remedy in respect of any such right, liability, security, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, and remedy may be carried on as if this Act had not been passed.

question of fact, whether or not the house forms part of a street: *R. v. Pinner*, 51 L. J. M. C. 122. See the cases cited under s. 73 of the London Building Act, 1894, *ante*, p. 507, and see *Simpson v. Smith*, L. R. 6 C. P. 87; disapproved in *Plumstead District Board of Works v. Spackman*, *supra*; *Corporation of Plymouth v. Woodward*, L. R. 15 Eq. 449. See v. *Bradford (Municipal)*, 8 L. T. N. S. 401. The offence to which this penalty is applicable continues so long as the addition to the house is maintained after written notice from the urban authority, notwithstanding that the addition was completed before the notice was given: *Rumball v. Schmidt*, 8 Q. B. D. 603. The court will be slow to restrain a local authority from pursuing its statutory remedy, unless it is proved that any trespass is threatened or intended by that body: *Grand Junction Works Co. v. Hampton U. D. C.* (1898), 2 Ch. 331. See also *U. G. v. Widdowson House Estate Co.* (1901), 2 Ch. 34.

Dismissal of proceedings owing to non-service of notice is no bar to subsequent proceedings: *Jenkins v. Merthyr U. D. C.*, 80 L. J. 600.

As to the procedure when the justices are divided in their opinion, see *Kings v. Green*, 67 L. J. Q. B. 543.

PUBLIC HEALTH ACTS AMENDMENT ACT, 1890.

53 & 54 VICT. c. 59.

An Act to amend the Public Health Acts.

[18th August, 1890.]

PART I.

GENERAL.

1. *Division of Act into parts.*—This Act is divided into parts as follows :—
 Part I.—General.
 Part III.—Sanitary and other provisions.

2. *Short title, construction and extent of Act.*—(1) This Act shall be construed as one with the Public Health Acts.

(2) Part One of this Act shall extend to England and Wales and Ireland, exclusive of the administrative county of London. Parts Two, Three, Four, and Five shall extend to any district in which they are respectively adopted under the provisions of this Act.

(3) This Act may be cited as the Public Health Acts Amendment Act, 1890, and this Act and the Public Health Acts may be cited together as the Public Health Acts.

3. *Adoption of Act by local authorities.*—The following provisions shall have effect with regard to the adoption of the parts of this Act, which are adoptive, by local authorities :—

- (1) An urban authority may adopt all or any of such parts.
- (2) A rural authority may adopt Part Three so far as it is declared by this Act to be applicable to such authority, (a) without prejudice to the provisions of this Act relating to the investing of rural authorities with urban powers.
- (3) The adoption shall be by a resolution, etc. (b)

5. *[Power to Local Government Board to extend Act to rural districts.]*

6. *Legal proceedings, etc.*—Offences under this Act may be prosecuted, and penalties, forfeitures, costs, and expenses recovered, in like manner and subject to the same provisions as offences which may be prosecuted and penalties, forfeitures, costs, and expenses, which may be recovered in a summary manner under the Public Health Acts.

7. *Appeals to quarter sessions.*—(1) Any person aggrieved—

- (a) By any order, judgment, determination, or requirement, of a local authority under this Act ;
- (b) By the withholding of any order, certificate, licence, consent, or approval, which may be made, granted, or given by a local authority under this Act ;
- (c) By any conviction or order of a court of summary jurisdiction under any provision of this Act ;

(a) See s. 50, *post*.

(b) Here follow regulations as to mode of procedure by the local authority.

may appeal in manner provided by the Summary Jurisdiction Act to a court of quarter sessions.

(2) This section shall not apply in cases where there is an appeal to the Local Government Board under s. 263 of the Public Health Act, 1875.

8. *More than one sum in one summons, etc.*—Any information, complaint, warrant, or summons made or issued for the purposes of this Act, or of the Public Health Acts, may contain in the body thereof or in a schedule thereto several sums.

10. *Powers of Act cumulative.*—(1) All powers given to a local authority under this Act shall be deemed to be in addition to and not in derogation of any other powers conferred upon such local authority by any Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not been passed.

(2) Nothing in this Act shall exempt any person from any penalty to which he would have been liable if this Act had not been passed, provided that no person shall be liable to pay, except in the case of a daily penalty, more than one penalty in respect of the same offence.

11. *Interpretation.*—(1) The expression "ashpit" in the Public Health Acts and in this Act shall for the purposes of the execution of those Acts and of this Act include any ashtub or other receptacle for the deposit of ashes, faecal matter, or refuse. (c)

(2) A street or part of a street which has been asphalted or paved with wood, tar paving, or artificial stone, or other improved paving of any kind, shall be deemed to have been paved within the meaning of any provision of the Public Health Acts. (d)

Provided that a street shall not be deemed to be paved to the satisfaction of an urban authority unless it is paved with such kind as well as with such quality of paving as the local authority shall consider suitable for the street.

(3) In this Act, if not inconsistent with the context—

The expression "local authority" means (e) etc.

The expressions "urban sanitary district" and "rural sanitary district" mean, etc.

The expression "sanitary convenience" includes urinals, water-closets, earth-closets, privies, and any similar convenience.

The expression "daily penalty" means a penalty for each day on which any offence is continued after conviction therefor.

The expressions "surveyor," "lands," "premises," "owner," "street," "house," "drain," "sewer," have respectively the same meaning as in the Public Health Acts. (f)

PART III.

SANITARY AND OTHER PROVISIONS.

13-15. [*Prevention of danger from telegraph wires.*]

16. [*Injurious matters not to pass into sewers.*]

17. [*Chemical refuse, steam, etc., not to be turned into sewers.*]

18. *Provision as to local authority making communications with or altering, etc.,*

(c) See P. H. A. 1875, s. 35, *ante*, p. 621.

(d) This sub-section was passed to meet the case of *Attorney-General v. Biddler*, 47 J. P. 263.

(e) See now Local Government Act, 1894, establishing District Councils.

(f) See ss. 6, 9, of the Act of 1875, *ante*.

drains and sewers.—(1) (*g*) Where the owner or occupier of any premises is entitled to cause any sewer or drain from those premises to communicate with any sewer of the local authority, the local authority shall, if requested to do so by such owner or occupier, and upon the cost thereof being paid in advance to the local authority, themselves make the communication and execute all works necessary for that purpose. (*h*)

(2) The cost of making such communication (including all costs incidental thereto) shall be estimated by the surveyor of the local authority, but in case the owner or occupier of the premises, as the case may be, is dissatisfied with such estimate, he may, if the estimate is under fifty pounds, apply to a court of summary jurisdiction to fix the amount to be paid for such cost, and if the estimate is over fifty pounds have the same determined by arbitration in manner provided by the Public Health Acts.

(3) A local authority may agree with the owner of any premises that any sewer or drain which such owner is required, or desires, to make, alter, or enlarge, or any part of such sewer or drain, shall be made, altered, or enlarged by the local authority.

19. *Extension of 38 & 39 Vict. c. 55, s. 41.*—(1) (*g*) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain (*i*) an application may be made under s. 41 (*k*) of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction.

(2) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly. (*l*)

(3) For the purposes of this section the expression “drain” includes a drain used for the drainage of more than one building.

20. [*Sanitary conveniences for public accommodation.*]

21. [*Sanitary conveniences used in common.*]

22. [*Sanitary conveniences for manufactories.*]

23. [*Extension of 38 & 39 Vict. s. 157.*]

24. [*Rooms over privies, etc., not to be used as dwelling or sleeping rooms.*]

25. *Penalty for erecting buildings on ground filled up with offensive matter.*—(1) It shall not be lawful to erect a new building (*m*) on any ground which has been filled up with any matter impregnated with fecal, animal, or vegetable matter, or upon which any such matter has been deposited, unless and until such matter

(*g*) This section may be adopted by a rural authority, see s. 50 of this Act.

(*h*) See ss. 21, 22 of the Public Health Act, 1875, *ante*.

(*i*) It is still the law that a drain which receives the drainage of two or more houses belonging to the same owner is a sewer.

(*k*) See note to that section, *ante*. The local authority may treat a drain which connects two or more houses, the property of different owners, with a public sewer as a single private drain, and repairable by such owners individually: *Eastbourne (Mayor) v. Bradford* (1896), 2 Q. B. 205; following *Self v. Hore Commissioners* (1895), 1 Q. B. 685, and disapproving *Hill v. Hair* (1895), 1 Q. B. 906. This case was also doubted in *Seal v. Merthyr Tydfil Urban Council* (1897), 2 Q. B. 543. See also *Southwold Corporation v. Crowdy*, 67 J. P. 278; *Jackson v. Wimbledon U. D. C.* (1905), 2 K. B. 27; *Thompson v. Mayor of Eccles* (1905), 1 K. B. 110.

(*l*) Where no proceedings are taken under s. 41 of the Act of 1875, this section does not affect the general obligation of the authority under s. 15 of that Act, to keep in repair all sewers belonging to them, including a sewer which may be treated as a single private drain for the purposes of the text: *R. v. Mayor, etc., of Hastings* (1897), 1 Q. B. 46. See also *Lancaster v. Barnes U. C.* (1898), 1 Q. B. 855.

(*m*) See s. 159 of the P. H. A., 1875, for the meaning of this term.

shall have been properly removed by excavation or otherwise, or shall have been rendered or have become innocuous.

(2) Every person who does or causes, or wilfully permits to be done any act in contravention of this section shall for every such offence be liable to a penalty not exceeding £5, and a daily penalty not exceeding 40s.

27. [Provision for keeping common courts and passages clean.]

33. Buildings described in deposited plans otherwise than as dwelling-houses not to be used as such.]—(1) Where the plan of a building has been, either before or after the adoption of this Part of this Act in any district, deposited with a local authority in pursuance of any Act of Parliament or byelaw, and that building is described therein otherwise than as a dwelling-house, any person who wilfully uses or knowingly permits to be used such building or any part thereof for the purposes of habitation by any person other than the person placed therein to take care thereof, and the family of such person, shall be guilty of an offence under this section, and shall be liable to a penalty not exceeding £5, and to a daily penalty not exceeding 40s. (n)

(2) Provided that if such building has in the rear thereof and adjoining and exclusively belonging thereto such an open space as is required by any Act of Parliament or byelaw for the time being in force with respect to buildings intended to be used as dwelling-houses, and if such part of the building as is intended to be used as a dwelling-house has undergone such structural alterations, if any, as are necessary in the opinion of the local authority to render it fit for that purpose, the owner may use the same as a dwelling-house.

34. Hoards to be set up during progress of buildings, etc.]—(1) Every person intending to build or take down any building, or to alter or repair the outward part of any building in any street or court, shall—

- (a) before beginning the same, unless the urban authority otherwise consent in writing, cause close-boarded hoards or fences to the satisfaction of the urban authority to be put up in order to separate the building from the street or court;
- (b) if the urban authority so require, make a convenient covered platform and handrail to serve as a footway for passengers outside of such hoard or fence;
- (c) continue such hoard or fence with such platform and handrail as aforesaid standing and in good condition to the satisfaction of the urban authority during such time as they may require;
- (d) if required by the urban authority, cause the same to be sufficiently lighted during the night;
- (e) remove the same when required by the urban authority.

(2) Every person who fails to comply with any of the provisions of this section shall be liable to a penalty not exceeding £5, and to a daily penalty not exceeding 40s.

(3) 10 & 11 Vict. c. 31.]—Where this Part of this Act is adopted s. 80 of the Town Improvement Clauses Act, 1847, shall be repealed, and this section shall be deemed to be substituted therefor.

35. As to repair of cellars under streets.]—(1) All vaults, arches, and cellars under any street, and all openings into such vaults, arches, or cellars in the surface of any street, and all cellar-heads, gratings, lights, and coal holes in the surface of any street, and all landings, flags, or stores of the path or street supporting the same respectively, shall be kept in good condition and repaired by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong.

(2) Where any default is made in complying with the provisions of this section, the urban authority may, after twenty-four hours' notice in that behalf,

(a) It is no defence to proceedings under this section that the plans have been deposited as plans for the conversion into a dwelling-house of a building not originally constructed as such, and that the local authority have not signified their disapproval within one month as required by s. 145 of the Act of 1875. *T. v. T.*, 80 L. T. 627.

cause anything in respect of which such default is made to be repaired or put into good condition, and the expenses of so doing shall be paid to the urban authority by such owner or occupier respectively, or in default may be recovered in a summary manner.

36. [*Means of ingress to and egress from places of public resort.*]

41. (p) *Adoption of private streets.*—Where this Part of this Act is adopted, s. 152 of the Public Health Act, 1875, shall be repealed, and the following provisions shall be substituted in lieu thereof:—

- (1) Whenever all or any of the works mentioned in sect. 150 of the Public Health Act, 1875, have been executed in a street or part of a street under that section by an urban authority, and the urban authority are of opinion that such street or part of a street ought to become a highway repairable by the inhabitants at large, they may by notice to be fixed up in such street or part of a street declare the whole of such street or part of a street to be a highway repairable by the inhabitants at large, and thereupon such street or part of a street as defined in the notice shall become a highway repairable by the inhabitants at large.
- (2) Provided that no such street shall become a highway so repairable if within one month after such notice has been put up the owner or the majority in number or value of owners of such street by notice in writing to the urban authority object thereto, and in ascertaining such majority joint owners shall be reckoned as one owner. (q)

50. *Application of Part of Act in rural districts.*—The following provisions of this Part of this Act shall be applicable in rural sanitary districts, namely,—

- S. 16, relating to injurious matter being passed into sewers.
- S. 17, relating to the turning of chemical refuse, steam, etc., into sewers.
- S. 18, relating to local authorities making communication with drains, etc.
- S. 19, relating to the extension of s. 41 of the Public Health Act, 1875.
- So much of s. 23 relating to the extension of s. 157 of the Public Health Act, 1875, as applies to rural authorities.
- S. 25, relating to the penalty for erecting buildings on ground filled up with offensive matter.
- S. 33, relating to the use of buildings described in deposited plans otherwise than dwelling-houses.

(p) This section does not apply to any district to which the Private Street Works Act, 1892, applies; see s. 25 of that Act. See notes to ss. 152 and 150 of the 1875 Act, *ante*, pp. 624, 627.

(q) Cf. P. II. A. 1875, s. 152, *ad fin.*

LONDON COUNTY COUNCIL BYELAWS. (a)

(a) BYELAW RELATING TO THE CONSTRUCTION OF SEWERS AND LAYING OF HOUSE-DRAINS IN LONDON.

Made by the Metropolitan Board of Works on the 14th day of March, 1856, under the Metropolis Management Act, 1855. It is continued in force by the 123rd section of the Local Government Act, 1888. (b)

No sewer shall be made without the previous approval of the London County Council, etc.

Three clear days' notice in writing shall be given to the London County Council by a Vestry or District Board (*Borough Council*) previously to the connection of any sewer or drain with a main sewer, and the necessary junction for that purpose shall be made by such Vestry or District Board (*Borough Council*) to the satisfaction of the London County Council.

By an order of the Metropolitan Board of Works of May, 1857 (No. 4), it was further provided :

Where it is intended to lay house-drains into main sewers, the following is to be the form of notice to be given by Vestries and District Boards:—

To the Metropolitan Board of Works (London County Council).

Application having been made to the Vestry or District Board (*Council of the Metropolitan Borough*) of by of for leave to lay down a pipe drain into the main sewer, situate inches in diameter, to and from the house situate the said Vestry or District Board of therefore hereby give notice, in accordance with the regulations of the said Board (*London County Council*), that the said communication with the said sewer will be made by them at the expiration of three days from the service hereof.

Dated this day of 18 .

The following formalities shall be observed by persons wishing to branch sewers into main or other sewers, and by persons proposing to branch drains into main sewers:—

All persons wishing to make or branch a sewer either into a sewer vested in the Metropolitan Board of Works (*London County Council*), or into a sewer vested in any Vestry or District Board (*Metropolitan Borough Council*) shall, in the first instance, lay the plans and sections relating thereto before, and apply for the sanction of, the Vestry or District Board (*Council of the Metropolitan Borough*) in which such last-mentioned sewer shall be situate, and no such sewer shall be begun to be made until the sanction of such Vestry or District Board (*Borough Council*) shall have been given.

Before any Vestry or District Board (*Borough Council*) shall sanction the construction of any such sewer, they shall submit the plans and sections thereof, when the same shall have been approved by them, to the Metropolitan Board of Works (*London County Council*), for their sanction, in the same manner as if such sewer were proposed to be constructed by such Vestry or District Board (*Borough Council*).

(a) A manual containing the Byelaws and Regulations of the Council, revised to March, 1900, is published by the Council.

(b) And see s. 216 of London Building Act, 1871.

All persons wishing to make or branch any drain into a sewer vested in the Metropolitan Board of Works (*London County Council*), shall, seven days before commencing any works for that purpose, submit a proper plan and description in reference thereto before, and apply in writing for the sanction of, the Vestry or District Board of the Parish or District (*Council of the Metropolitan Borough*) in which such sewer shall be situate, and no such work shall be commenced until the sanction of the said Vestry or District Board (*Borough Council*) shall have been given.

- (b) BYELAWS MADE BY THE COUNCIL ON JUNE 30 AND OCTOBER 13, 1891, UNDER SECTION 16 (c) OF THE METROPOLIS MANAGEMENT AND BUILDINGS ACTS AMENDMENT ACT, 1878 (s. 164 OF LONDON BUILDING ACT, 1894).

1. *Repeal of previous byclaws.*

And in lieu thereof the following are made :—

2. *Foundations and sites of buildings.*

No house, building, or other erection, shall be erected upon any site (*d*) or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any faecal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed, by excavation or otherwise, from such site. Any holes caused by such excavation must, if not used for a basement or cellar, be filled in with hard brick or dry rubbish, or concrete, or other suitable material to be approved by the district surveyor.

The site of every house or building shall be covered with a layer of good concrete, at least six inches thick, and smoothed on the upper surface.

The foundations of the walls of every house or building shall be formed of a bed of good concrete, not less than nine inches thick, and projecting at least four inches on each side of the lowest course of footings of such walls. If the site be upon a natural bed of gravel, concrete may be omitted from the foundations of the walls, with the approval of the district surveyor.

The concrete must be composed of clean gravel, broken hard brick, properly burnt ballast, or other hard material to be approved by the district surveyor, well mixed with freshly burnt lime or cement in the proportions (*e*) of one of lime to six, and one of cement to eight of the other material.

3. *Description and quality of the substances of walls. (g)*

The external walls of every house, building, or other erection shall, except in the case of concrete buildings, be constructed of good, hard, sound, well-burnt bricks, or of stone.

Similar bricks shall be used in the portions of party and cross walls below the surface or level of the ground, and above the roof, including the chimney stacks. Cutters or mahms may be used in arches over recesses and openings in, or for facings of, external walls.

Stone used for the construction of walls must be free from vents, cracks, and sand-holes, and be laid on its natural bed.

(c) This section is repealed by the London Building Act, 1894, and replaced by s. 164 (1) (C) & (E) of that Act. The byclaws continue to be in force by virtue of s. 216 of the London Building Act, 1894.

(d) The meaning of the word "site" is governed by the interpretation of that word in the Act: *Blashill v. Chambers*, 14 Q. B. D. 479. See this case as to soil below the level of the bottom of the foundations.

(e) See *Dicksee v. Sloman*, noted, *ante*, p. 571.

(g) See s. 53 of the London Building Act, 1894, *ante*, p. 500; and the first schedule to that Act, *ante*, p. 546, *et seq.*

All brick and stone work shall be put together with good mortar or good cement.

The mortar to be used must be composed of freshly burned lime and clean sharp sand or grit, without earthy matter, in the proportions of one of lime to three of sand or grit. (h)

The cement to be used must be Portland cement, or other cement of equal quality, to be approved by the district surveyor, mixed with clean sharp sand or grit, in the proportions of one of cement to four of sand or grit.

Burnt ballast or broken brick (i) may be substituted for sand or grit, provided such material be properly mixed with lime in a mortar mill.

Every wall of a house or building shall have a damp course composed of materials impervious to moisture, (k) to be approved by the district surveyor, extending throughout its whole thickness at the level of not less than six inches below the level of the lowest floor. Every external wall or inclosing wall of habitable rooms or their appurtenances or cellars which abuts against the earth shall be protected by materials impervious to moisture to the satisfaction of the district surveyor.

The top of every party wall and parapet wall shall be finished with one course of hard, well-burnt bricks set on edge, in cement, or by a coping of any other waterproof and fire-resisting material properly secured.

Whenever concrete is used in the construction of walls, the concrete shall be composed of Portland cement and of clean Thames or pit ballast, or gravel, or broken brick or stone, or furnace clinkers, with clean sand in the following proportions, viz. one part of Portland cement, two parts of clean sand, and three parts of the coarse material, which is to be broken up sufficiently small to pass through a two-inch ring.

The proportions of the materials to be strictly observed, and to be ascertained by careful admeasurement; and the mixing either by machine or hand to be most carefully done with clean water, and, if mixed by hand, the material to be turned over dry before the water is added.

The walls to be carried up regularly and in parallel frames of equal height, and the surface of the concrete filled in the frame to be left rough and uneven, to form a key for the next frame of concrete.

The thicknesses of concrete walls to be equal at the least to the thicknesses for walls to be constructed of brickwork prescribed by the 12th section (l) of the Metropolitan Building Act, 1855, and the first schedule referred to therein.

Such proportions of concrete party-walls and chimney-stacks as are carried above the roofs of buildings to be rendered externally with Portland cement.

4. Duties of District Surveyors. (m)

It shall be the duty of each district surveyor, on receiving notice of the commencement of any house, building, or other erection, or of any alteration or addition, or on his becoming aware that any house, building, or other erection, or any alteration or addition, is being proceeded with, to see that the provisions of the foregoing by-laws are duly observed (except in cases where the London County Council may have dispensed with the observance thereof), and to see that the terms and conditions upon which any dispensation may have been granted are complied with.

5. Fees to be paid to District Surveyor. (n)

6. Deposit of plans and sections.

On notice being given to a district surveyor of the intended erection, re-erection, alteration of, or addition to a public building, or a building to which s. 56 (o) of the Metropolitan Building Act, 1855, applies, it shall be the duty of the person giving such notice to deposit plans and sections of such erection, re-erection, alteration,

(h) As to results which may follow upon the use of bad mortar, see *Smith v. Johnson*, Appendix, p. 668.

(i) The brick used must be clean brick. See *Duke v. Sloman, Builder*, August 1, 1896, p. 106.

(k) "Felt" has been held (by the justices at the Middlesex Sessions) not to be material impervious to moisture, see *Edmonton U. D. C. v. Smith, Builder*, August 20, 1898.

(l) Now s. 53 of the London Building Act, 1904.

(m) See ss. 138 *et seq.* of the Building Act, 1894, ante, p. 528.

(n) See s. 154 *et seq.* of the same Act, ante, p. 532.

(o) Now s. 82 of the London Building Act, 1904.

or addition with the district surveyor. Such plans and sections shall be of sufficient detail to show the construction.

On notice being given to the district surveyor of the intended erection or alteration of or addition to any house, building, or other erection, other than a public building, or one to which s. 56 (o) of the Metropolitan Building Act, 1855, applies, the district surveyor may, if he think fit so to do, by notice in writing, require the person giving such notice to produce a plan or plans and sections of any such house, building, or other erection, or of the intended alterations or additions thereto, for his inspection.

7. *Penalties and dispensation. (p)*

In case of any breach of any of the provisions contained in these byelaws, the offender shall be liable for each breach to a penalty not exceeding five pounds, and in each case of a continuing offence to a further penalty not exceeding forty shillings for each day after notice of such offence from the London County Council or the district surveyor.

In any case in which the Council think it expedient, they may dispense with the observance of any of the foregoing byelaws, or any part thereof, upon such terms and conditions as they may think proper, and in case of the non-observance of any terms and conditions upon which the Council may have dispensed with the observance of any of the foregoing byelaws, then such proceedings may be taken, and such liabilities shall be incurred, as if the same had been enacted by such byelaws.

(c) BYELAWS MADE BY THE LONDON COUNTY COUNCIL ON OCTOBER 13, 1891, UNDER SECTION 31 OF THE LONDON COUNCIL (GENERAL POWERS) ACT, 1890. (q)

1. *Description and quality of the substances of which plastering is to be made.*

All laths used for plastering shall be sound laths, free from sap, but iron or other incombustible laths, wire netting, or other suitable material to the satisfaction of the district surveyor may be used.

Plastering or coarse stuff shall be composed of lime and sand in the proportion of one of lime to three of sand, mixed with water and hair; but Portland cement, Keene's cement, Parian cement, Martin's cement, Selenitic cement, or other approved cement or plaster of Paris may also be used for plastering.

The lime to be used must be freshly burned lime.

The sand to be used must be clean sharp sand, free from loam and earthy matter.

The hair to be used must be good and sound, and free from grease or dirt; 1 lb. of hair to be used to every three cubic feet of coarse stuff. Fibrous material to the satisfaction of the district surveyor may be used instead of hair, and ground brick or furnace slag to the satisfaction of the district surveyor may be used instead of sand.

The setting coat shall be composed of lime or cement mixed with clean washed sand or of cement only.

Clean water only is to be used in mixing the material.

The Portland cement to be used must weigh not less than 90 lbs. to the imperial bushel.

Fibrous slab or other slab plastering, of sufficient thickness and securely fixed, may be used on ceilings, partitions, and walls, to the satisfaction of the district surveyor.

2. *As to the mode in which and the materials with which any excavation outside the site of a building is to be filled up.*

Any excavation made within a line drawn outside the site of a house, building, or other erection, and at a uniform distance therefrom of three feet, shall not be filled up otherwise than with the natural soil or with brick or dry rubbish or other suitable material to be approved by the district surveyor, not consisting of, nor impregnated or mixed with, any faecal, animal, or vegetable matter, or with dust or slop, or other refuse, and shall be properly rammed.

(o) Now s. 82 of the London Building Act, 1894.

(p) See s. 166 and following sections of the Building Act, 1894, as to recovery, application, and appeal in respect of penalties, *ante*, p. 534.

(q) See now London Building Act, 1894, ss. 164, 216.

3. Duties of District Surveyors.

It shall be the duty of each district surveyor on receiving notice of the commencement of any house, building, or other erection, or on his becoming aware that any house, building, or other erection is being proceeded with, or that any excavation is being made within a line drawn outside the site of a house, building, or other erection and within three feet therefrom, to see that the plastering is of the description and quality prescribed by, and that any excavation be filled up with the material and in manner specified in, the foregoing byelaws.

4. Fees to be paid to District Surveyors.

There shall be paid to the district surveyor in respect of his supervision of the plastering of any house, building, or other erection, and in respect of the filling in of an excavation made outside the site of any house, building, or other erection, and within three feet therefrom, an inclusive fee of five shillings, such fee to be payable in the manner and at the time specified in s. 51 (r) of the Metropolitan Building Act, 1855.

5. Penalties.

In case of any breach of the provisions contained in these byelaws, the offender shall be liable for each offence to a penalty not exceeding five pounds, and, in each case of a continuing offence, to a further penalty not exceeding forty shillings for each day after notice of such offence from the London County Council or the district surveyor.

(d) BYELAWS AS TO THE FORMATION OF NEW STREETS IN THE METROPOLIS. METROPOLIS LOCAL MANAGEMENT ACT.

Byelaw made by the Metropolitan Board of Works on the 17th day of March, 1857.

1. (s) Four weeks at the least before any new street shall be laid out, written notice shall be given to the Metropolitan Board of Works, at their office, Spring Gardens, in the County of Middlesex, by the person or persons intending to lay out such street, stating the proposed level and width thereof, and accompanied by a plan of the ground showing the local situation of the same.

2. (t) Forty feet at least shall be the width of every new street intended for carriage traffic; twenty feet at the least shall be the width of every new street intended only for foot traffic; provided that the said width, respectively, shall be construed to mean the width of the carriage and foot way only, exclusive of any gardens, forecourts, open areas, or other spaces in front of the houses or buildings erected or intended to be erected in any street.

3. Every new street shall, unless the Metropolitan Board of Works otherwise consent in writing, have at the least two entrances of the full width of such street, and shall be open from the ground upward.

4. The measurement of the width of every new street shall be taken at a right angle to the centre thereof, half on either side from the centre or crown of the roadway to the external wall or front of the intended house or buildings on each side thereof; but where forecourts or other spaces are intended to be left in front of the houses or buildings, then the width of the street, as already defined, shall be measured from the centre line up to the fence, railing, or boundary dividing or intended to divide such forecourts, gardens, or spaces from the public way.

5. The carriageway of every new street must curve or fall from the centre or crown thereof at the rate of three eighths of an inch, at the least, for every foot of breadth.

6. In every new street the kerb to each footpath must not be less than four nor more than eight inches above the channel of the roadway, except in the case of

(s) New s. 157 of the London Building Act, 1894.

(t) See s. 8 of the London Building Act, 1894.

(r) *Ibid.*, s. 12.

crossings paved or formed for the use of foot passengers: and the slope of every footpath towards the kerb must be half an inch to every foot of width, if the footpath be unpaved, or not less than a quarter of an inch to every foot of width if the footpath be paved.

7. (u) In this byelaw the word "street" shall be interpreted to apply to and include any highway (except the carriageway of any turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, or passage, whether a thoroughfare or not; and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage.

8. (x) In case of any breach of the regulations contained in this byelaw, the offender shall be liable for each offence to a penalty of forty shillings; and in case of a continuing offence to a further penalty of twenty shillings for each day after notice thereof from the Metropolitan Board of Works.

By the 40th Section of the Local Government Act, 1888, the powers of the Metropolitan Board of Works are transferred to the London County Council, and any notice which by the above byelaw is directed to be given to the Board must henceforth be given to the Council, and any consent which might have been given by the Board may be given by the Council, and any notice which might have been given under the said byelaw by the Board to an offender may be given by the Council.

[The following Regulations, Rules, and Standing Orders with regard to matters under the London Building Act, 1894, and the London Building Act, 1894 (Amendment) Act, 1898, were approved by the Council on the 8th day of November, 1904, in substitution for those in force on that date.]

(e) REGULATIONS AND RULES AS TO APPLICATIONS FOR SANCTION, CONSENT, AND LICENCES, ETC., UNDER THE LONDON BUILDING ACT, 1894, AND THE LONDON BUILDING ACT, 1894 (AMENDMENT) ACT, 1898.

The attention of applicants is specially directed to the provision of s. 194 of the London Building Act, 1894, whereby all applications, plans, and other documents delivered at the office of the Council, on delivery there become the property of the Council.

I.—GENERAL.

Every application (except those under Part XI. of the Act of 1894, as to which see paragraph II. (14) below) must be addressed to the superintending architect, County Hall, Spring Gardens, S.W., and must state under which section of the Acts it is made.

All applications must be in writing on foolscap paper, and all drawings (including plans, sections, and elevations) must be on tracing linen of sufficient size to permit of the approval of the Council being endorsed thereon.

The scale to which drawings are made must be drawn thereon and not expressed in words; the north point must be indicated on all plans.

The site must be coloured pink, the proposed building red, existing buildings grey, and any land to be dedicated and left open for the use of the public blue.

The full name and address of the person on whose behalf the application is made and the extent and character of his interest in the property, whether any portion of the site on which the building is proposed to be erected forms part of a disused burial ground, and whether the property is freehold, leasehold, or copyhold, must be stated. Particulars must be furnished as to the nature of the application and the situation of the street, building, or structure, and the purpose for which such building is required.

All drawings must be in duplicate, and be drawn on the unglazed side of the tracing linen.

(u) See s. 5 (1) of the London Building Act, 1894.

(x) *Ibid.*, s. 200 (1).

II.—PLANS, SECTIONS, AND PARTICULARS REQUIRED IN EACH CASE.

- (1) *Formation and laying out of new streets—Adaptation of ways for streets and widenings of streets* (see also 13 below), etc., s. 7 and s. 10 of the 1894 Act.

Plans must be to the scale of 88 feet to the inch, and must be accompanied by longitudinal sections to the same horizontal scale, but to a vertical scale of 11 feet to the inch, showing the natural and intended surface levels of the streets (computed from ordnance or some other fixed datum), and by cross sections to a scale of 22 feet to the inch.

The width of the new street must also be figured.

A key plan of the locality showing the surrounding property must also be sent.

Each street must be marked on the plans with a number, and referred to in the application as street No. 1, street No. 2, etc. In the event of the application being sanctioned, two additional copies of the plans will be required, and the intended name of each street, identified by reference to the number of the street on the plans, must be submitted in accordance with s. 32 of the Act of 1894. (For regulations as to street naming, see pp. 649, 650, *post.*)

In the case of the adaptation of ways for streets or the widening of streets under s. 10, sections will not be required.

Every application for sanction to the formation or laying out of any street, or for the adaptation of any way as a street, must be accompanied by correct and sufficient particulars in writing (which must be verified by production of title deeds should the Council so require) showing how the person on whose behalf the application is made has acquired such control over the land forming the site of the proposed street shown on the plan accompanying his application, as may be requisite to enable him to form or lay out such street, or to adapt such way as the case may be. Such particulars must contain the date of, and the names and addresses of the parties to, the document or documents under which the applicant acquired such control.

- (2) *Buildings* (a) *within the prescribed distance*, (b) *in advance of the general line of buildings*, etc., s. 13, s. 17, and s. 22 of the 1894 Act, and ss. 3 and 4 of the 1893 Act.

Plans must be to a scale of 22 feet to the inch, and must show the situation of the building in relation to others adjacent to a sufficient extent to show the frontage of the street on either side of the site. The height and precise distance from the centre of the roadway of the proposed building and the width of the street are to be figured.

The names and addresses of the owners and occupiers of the nearest building on each side of the proposed building must also be sent.

In the event of an application being approved, an additional copy of the drawings will be required.

In the case of applications under s. 13 (5), the extent and height of the old buildings on the site must be shown to the same scale and a copy of the plans certified by the district surveyor, together with the originals, should be forwarded. The original certified plans will be returned after being compared with the copy.

- (3) *Open space at the rear of domestic buildings*, s. 11; and *open space about working-class dwellings not abutting upon a street*, s. 12 of the 1894 Act and s. 4 of the 1893 Act.

Plans and sections must be to the scale of one-eighth of an inch to the foot; they must indicate the height of the proposed buildings in every part; there must also be a block plan to a scale of 22 feet to 1 inch, showing the adjoining premises, with the approximate height of any buildings thereon, and in any case where it is desired to extend a building or any part thereof above the diagonal line directed to be drawn by the Act of 1894, the diagonal line and also the horizontal line from which it is drawn must be shown on such drawings.

- (4) *Deviations from certified plans of domestic buildings previously existing on old sites*, s. 43 of the 1894 Act.

Plans and sections to a scale of one-eighth of an inch to a foot, showing the height and extent of the previously existing buildings, and certified by the district surveyor, must be sent, together with plans and sections of the proposed new buildings

to the same scale. The position and approximate height of any adjacent buildings must be indicated on a block plan to a scale of 22 feet to 1 inch. The area of open space to be left and the height of new building must be figured.

(5) *Laying out new streets on a cleared area, s. 44 of the 1894 Act.*

In all cases where the proposed new streets have been sanctioned but not formed, the date of such sanction must be specified in any application submitted under s. 44, and every such application must be accompanied by a block plan to a scale of 44 feet to 1 inch, showing the width of all old streets on the area, and the extent and approximate height of all old buildings thereon, together with sections to a scale of one-eighth of an inch to the foot, showing the height of the proposed new buildings.

In any case where sanction has not been obtained to the formation or laying out of proposed new streets upon a cleared area, application for the sanction to such streets must be made in accordance with Regulation II. (1), and should accompany any application made under s. 44.

Applications cannot be entertained under s. 44 for modification or relaxation of the previous provisions of Part V., except in respect of either existing streets or streets for the formation of which the sanction has been obtained under Part II. of the 1894 Act.

(6) *Height of buildings, s. 47 and s. 49 of the 1894 Act.*

A block plan to a scale of 22 feet to an inch, showing the position of the proposed building and of any adjacent buildings, and the width of the street.

Also a plan and sections to a scale of one-eighth of an inch to the foot, showing the height of the several parts of the building.

(7) *Recesses and openings in external walls and recesses in party walls, s. 54 of the 1894 Act.*

A block plan to a scale of 22 feet to an inch showing the position of the building and of adjacent buildings.

Plans of the floors of the building and an elevation of the wall in which the recesses or openings occur to a scale of one-eighth of an inch to the foot. The sizes of the recesses and openings must be figured.

(8) *Timber in external walls, s. 55; and furnace chimney-shafts, s. 65 of the 1894 Act.*

Plans, sections, and elevations to the scale of one-eighth of an inch to a foot, together with such details to a larger scale as may be necessary to show the construction.

A block plan to a scale of 22 feet to the inch, showing the position of the building.

(9) *Means of escape from the upper storeys of high buildings, s. 63 of the 1894 Act.*

A block plan to a scale of 22 feet to an inch showing the position of the building and of adjoining buildings.

Plans of the floors above 60 feet from the street level to a scale of one-eighth of an inch to the foot, and full details of the means of escape to be provided.

(10) *Projections, s. 73 of the 1894 Act.*

In addition to the drawings, etc., required by Regulation II. (2), a plan, section, and side elevation to a scale of one-eighth of an inch to a foot. In the case of the application being approved, an additional copy of the drawings will be required.

(11) *Additional cubical extent, s. 76; and buildings for the supply of electricity, s. 203 of the 1894 Act.*

A block plan to a scale of 22 feet to the inch showing the position of the proposed building and buildings adjacent.

Plans and sections to a scale of one-eighth of an inch to the foot showing the height of the building in its various parts.

The use to which the various parts of the building are intended to be put is to be indicated, also the positions and numbers of any hydrants or other fire-extinguishing appliances proposed to be provided, and any points bearing upon the question of liability to fire.

(12) *Special and temporary buildings and structures.* Part VII. of the 1894 Act and ss. 6 and 7 of the 1898 Act.

Application must be accompanied by a block plan of the premises, showing the position of the proposed building or structure, and of any adjacent buildings or structures, and also by a plan, elevation, and section of the proposed building or structure to a scale of one-eighth of an inch to a foot, together with such sections and details to a scale sufficiently large to clearly show the construction.

A fee of 5s. must be paid to the cashier of the Council on depositing the application, and a further fee of 5s. on obtaining a notification of the order of the Council, and in no case will the approval or licence be issued until the fees are paid.

Every application for a renewal of an approval or licence for a temporary building or structure for a further period must be accompanied by a certificate from the district surveyor that it has not been altered as to construction or position, and in cases where the building or structure has existed for three years or more as to its stability for such further period as may be applied for, and also as to any repairs which may be requisite.

In cases where the building or structure has existed for less than three years, and if the inspector is merely to ascertain that the building has not been altered as to construction or position, and to certify that an extension of time may be allowed, a fee of 10s. may be demanded and received by the district surveyor.

In cases where the building or structure has existed for three years or more, and a certificate with regard to structural stability is required, a fee of 20s. may be demanded and received by the district surveyor.

(13) *Naming of streets and numbering of houses.* Part IV. of the 1894 Act.

No name is to be used for a street unless with the approval of the Council previously given, and it should be a name consisting of one word with or without the addition of "street," "road," or other like term.

The name should be one that is not already in use in the county; it should, if possible, be in some way associated with the locality.

The Council's list of streets and places in the Administrative County of London, together with an office list of available names, arranged under the districts for which they are appropriate, may be consulted by applicants.

Only such thoroughfares as may be deemed to be of sufficient length or importance may be designated "roads."

The Council will be prepared favourably to consider the use of the terms "avenue" and "grove" conditionally upon the planting and maintenance of suitable trees in the street in question; other descriptions, such as "gardens," "enclosed," "square," etc., may be used only when the terms seem appropriate.

Applicants proposing names for large blocks of buildings, e.g. artisans' dwellings, mansions, flats, etc., should have regard to the rules which apply to the naming of streets.

The Council should be notified of every name intended to be used as a postal address.

Any person or persons setting up any name to any street in London until the expiration of one month after notice of the intention to set up the name has been given to the Council, or setting up any name objected to by the Council under a 32 of the Act of 1894, is liable to a penalty of 40s., with a continuing penalty of 40s. for every day on which the offence continues after conviction.

In numbering houses the rules to be observed are as follows:—

St. Paul's Cathedral is recognised as a central point; and the numbering of houses begins at the end or entrance of the street nearest to that building, except where a street leads from a main thoroughfare to a less important street, and then the numbering starts from the main thoroughfare.

Taking, therefore, the side of a street as left and right (assuming that the

back is towards St. Paul's), the odd numbers will be assigned to the left-hand side, and the even numbers to the right-hand side.

(Under s. 36 of the Act the Council has the power to order "that any houses or buildings in any street or way or any part thereof shall for the purpose of distinguishing the same be marked with such numbers as they shall deem convenient for that purpose." Great inconvenience and expense in re-numbering would frequently be saved if the above rules were observed in the first instance.)

Any person interested in property affected by an order of the Council for re-naming streets or re-numbering houses is permitted, on application, to make a copy of the order and a tracing of the plan attached thereto; or a certified copy of the order and plan may be furnished to him on his paying the cost of making the same.

A fee of 1s. is to be charged to all persons seeking information involving a reference to the records with regard to orders for re-naming streets or re-numbering houses.

If a copy of an order and plan be required, there will be a further fee of not less than 1s. 6d. (see following scale).

A more extended plan may be obtained for a larger payment.

Copies of orders and plans are to be made in the superintending architect's department.

Scale of fees to be charged for the provision, under s. 38 of the London Building Act, 1894, of copies of orders, with or without plans, in relation to the re-naming of streets and the re-numbering of houses—

For a copy of an order without a plan, or with a plan showing		£	s.	d.
3 houses	.	—	1	6
	4 or 5 houses	—	2	—
	6 " 7 "	—	2	6
	8 " 9 "	—	3	—
	10 " 11 "	—	3	6
	12 " 13 "	—	4	—
	14 " 15 "	—	4	6
	16 to 20 "	—	5	—
	21 " 25 "	—	5	6
	26 " 30 "	—	6	—
For a copy of an order with a plan showing	31 " 35 "	—	6	6
	36 " 40 "	—	7	—
	41 " 45 "	—	7	6
	46 " 50 "	—	8	—
	51 " 75 "	—	10	6
	76 " 100 "	—	12	6
	101 " 150 "	—	15	—
	151 " 200 "	—	17	6
	201 " 300 "	1	—	—

(14) *Dwelling-houses on low-lying lands.* Part XI. (These regulations were made by the Council on the 26th day of March, 1895, under s. 123 of the London Building Act, 1894, and the concurrence of the Tribunal of Appeal was duly signified thereto on the 8th of April, 1895.)

Every person who shall be desirous of erecting or adapting any building to be used wholly or in part as a dwelling-house on any land in the county of London, of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the Council, shall first make a written application for a licence. Such application shall be addressed to the Clerk of the Council.

Such application shall contain a statement as to the nature and extent of the interest of the applicant in the building or buildings proposed to be erected or adapted, and be accompanied by a plan and section of the lowest floor of such building or buildings and curtilages thereof, to a scale of one-eighth of an inch to a foot, and by a block plan to a scale of not less than $\frac{1}{2500}$ (which may be on a sheet or sheets of the Ordnance Survey, or may be drawn on tracing linen), showing the position of such building or buildings, and the local sewer into which it is proposed to drain such buildings and the connection of such local sewer with an existing sewer of the Council.

Such plans and sections shall be accompanied by a description of the materials to be used in the construction of such building or buildings, and shall be coloured in accordance therewith. The points of the compass shall be marked on the block plan.

The position and course of the drainage system proposed to be adopted for the disposal of sewage and rain water, and its connection with the local sewer or an existing sewer of the Council, shall be clearly shown on the plans and sections, and the diameter and inclination of the drain pipes shall be figured thereon.

The plan and section shall also indicate in figures the level above or below ordnance datum at which it is proposed to construct the floor of the lowest rooms.

The decision given by the Chief Engineer of the Council upon such application shall be reported to the Building Act Committee, and the Committee shall report it to the Council, and, thereupon, if it is to the effect that the erection or adaptation may not be permitted, the Clerk of the Council shall by letter inform the applicant that the Council, acting upon the decision of the Engineer, has refused permission. If it is to the effect that the erection or adaptation may be permitted, a licence under the seal of the Council embodying the conditions of the Engineer's decision shall be issued to the applicant.

Regulation made by the Council on 26th March, 1895, under s. 122.

It shall not be lawful to place the underside of the lowest floor of any permitted building at such a level as will render it liable to flooding, and every permitted building shall be efficiently and properly drained to the satisfaction of the Engineer for the time being of the Council, either into a local sewer or into a main sewer of the Council.

*(15) Fire-resisting materials. Schedule II. of the London Building Act, 1894—
The Council on 28th March, 1899, passed the following resolution:—*

That the Council do, in pursuance with the powers vested in it by the second schedule of the London Building Act, 1894, approve of the following material as fire-resisting, namely, concrete composed of properly burned coke breeze, free from dust and organic impurities, and Portland cement, in the following proportions, viz.—five parts by measurement of coke breeze to one part by measurement of Portland cement, mixed together with clean water to the satisfaction of the district surveyor, when such concrete is used for filling in between the joints of floors, and is filled in to the depth of at least five inches.

STANDING ORDERS.

CONDITIONS UPON WHICH APPLICATIONS MAY BE GRANTED.

In dealing with applications made under the London Building Act, 1894, and the Amending Act of 1904, with reference to the undermentioned matters, the desirableness of imposing conditions to the following effect shall be considered, but this order shall not limit any power to vary such conditions or to impose such conditions in other matters than those mentioned, or to impose any other conditions in any matter.

In the matter of the formation or laying out of proposed streets, conditions to the following effect:—

(1) That within from the date of the order the roadway of the proposed street hereby sanctioned shall be clearly defined throughout by posts and rails, or so otherwise as the Council shall permit, and be thrown open to the public as a highway.

(2) That no building shall be commenced to be erected upon either side of such roadway, or upon a site abutting upon such roadway, unless such roadway shall have been and shall still remain so defined and thrown open as aforesaid, and unless such roadway shall have been and shall still remain so made as regards levels, direction, width, and gradient throughout as to comply with the provisions of any statutes and by-laws in force in London regulating streets and buildings, and unless such roadway shall also have been so made and shall still remain as to accord with the plans and sections attached hereto, and the particulars which accompanied the application for the sanction contained in this

order, and unless the name of the street has been approved by the Council, and as so approved shall have been affixed and shall be retained at both ends of the street.

In the matter of the erection of one-storey shops in advance of the general line of buildings, a condition to the following effect:—

That no part of the proposed shop or any structure or erection connected therewith do exceed 16 feet in height above the footway, or such other height as may be fixed by the Council.

In the matter of temporary buildings or structures dealt with under Part VII., conditions to the following effect:—

(1) That the building or structure be commenced and completed within such periods as may be deemed expedient.

(2) That if the building or structure be commenced or completed contrary to Condition 1, or be found at any time to have been so erected, set up, altered, or adapted as not to be in all respects in accordance with the application for the approval or licence and the plans and particulars relating to such application, or (when approved or licensed for a special purpose) to have been used for any purpose other than a purpose named in the approval or licence, or to have had any unauthorised addition made thereto, or any word, advertisement, or device made or retained thereon, such building or structure shall within seven days after service on any owner or occupier thereof for the time being of a notice from the Council requiring its removal, be entirely removed.

In any matter in which land is to be given up, conditions to the following effect:—

(1) That before the building is erected or within such period as may be named in the sanction, consent, licence, or approval, the land coloured blue upon the deposited plan shall be dedicated to and left open for the use of the public, and that no pier, pilaster, or other projection be placed on such land.

(2) That no vault, arch, cellar, or other construction shall be made in or under the said land coloured blue on the said plan without the previous consent in writing of the local authority.

And in all matters conditions to the following effect:—

That the building, structure, or work be set up, erected, or carried out, as the case may be, and retained without any addition thereto and in exact accordance with the application for the sanction, consent, licence, or approval, and the plans and particulars which accompanied such application.

No sanction, consent, licence, or approval shall be issued until the conditions imposed by the Council in granting the same have been, if the Council so require, accepted in writing by such persons as the Council shall consider the proper parties to comply with such conditions.

8th November, 1904.

(f) BYELAWS MADE BY THE LONDON COUNTY COUNCIL UNDER THE PUBLIC HEALTH (LONDON) ACT, 1891, ON JUNE 22, 1893.

BYELAWS UNDER S. 39 (1).

With respect to waterclosets, earthclosets, privies, ashpits, cesspools, and receptacles for dung, and the proper accessories thereof in connection with buildings, whether constructed before or after the passing of this Act.

Waterclosets and earthclosets.

1. Every person who shall hereafter construct a watercloset or earthcloset in connection with a building shall construct such watercloset or earthcloset in such a position, that in the case of a watercloset, one of its sides at least shall be an external wall, and in the case of an earthcloset two of its sides at least shall be external walls, which external wall or walls shall abut immediately upon the street, or upon a yard or garden or open space of not less than one hundred square feet of superficial area, measured horizontally at a point below the level of the floor of such closet. He shall not construct any such watercloset so that it is approached directly from any room used for the purpose of human habitation, or used for the manufacture, preparation,

or storage of food for man, or used as a factory, workshop, or workplace, nor shall he construct any earthcloset so that it can be entered otherwise than from the external air.

He shall construct such watercloset so that on any side on which it would abut on a room intended for human habitation, or used for the manufacture, preparation, or storage of food for man, or used as a factory, workshop, or workplace, it shall be enclosed by a solid wall or partition of brick or other materials, extending the entire height from the floor to the ceiling.

He shall provide any such watercloset that is approached from the external air with a floor of hard smooth or impervious material, having a fall to the door of such watercloset of half an inch to the foot.

He shall provide such watercloset with proper doors and fastenings.

Provided always that this byelaw shall not apply to any watercloset constructed below the surface of the ground and approached directly from an area or other open space available for purposes of ventilation, measuring at least forty superficial feet in extent, and having a distance across of not less than five feet, and not covered in otherwise than by a grating or railing.

2. Every person who shall construct a watercloset in connection with a building, whether the situation of such watercloset be or be not within or partly within such building, and every person who shall construct an earthcloset in connection with a building, shall construct in one of the walls of such watercloset or earthcloset which shall abut upon the public way, yard, garden, or open space, as provided by the preceding byelaw, a window of such dimensions that an area of not less than two square feet, which may be the whole or part of such window, shall open directly into the external air.

He shall, in addition to such window, cause such watercloset or earthcloset to be provided with adequate means of constant ventilation by at least one air-brick built in an external wall of such watercloset or earthcloset, or by an air-shaft, or by some other effectual method or appliance.

Waterclosets.

3. Every person who shall construct a watercloset in connection with a building, shall furnish such watercloset with a system of adequate capacity for the purpose of flushing, which shall be separate and distinct from any cistern used for drinking purposes, and shall be so constructed, fitted, and placed as to admit of the supply of water for use in such watercloset, so that there shall not be any direct connection between any service pipe upon the premises, and any part of the apparatus of such watercloset other than such flushing cistern.

Provided always that the foregoing requirement shall be deemed to be complied with in any case where the apparatus of a watercloset is connected for the purpose of flushing with a cistern of adequate capacity, which is used solely for flushing waterclosets and urinals.

He shall construct or fix the pipe and union connecting such flushing cistern with the pan, basin, or other receptacle with which such watercloset may be provided, so that such pipe and union shall not in any part have an internal diameter of less than one inch and a quarter.

He shall furnish such watercloset with a suitable apparatus for the effectual application of water to any pan, basin, or other receptacle with which such apparatus may be connected and used, and for the effectual flushing and cleansing of such pan, basin, or other receptacle, and for the prompt and effectual removal therefrom and from the trap connected therewith of any solid or liquid filth which may from time to time be deposited therein.

He shall furnish such watercloset with a pan, basin, or other suitable receptacle of non-absorbent material, and of such shape, of such capacity, and of such mode of construction as to receive and contain a sufficient quantity of water, and to allow all filth which may from time to time be deposited in such pan, basin, or receptacle, to fall free of the sides thereof and directly into the water received and contained in such pan, basin, or receptacle.

He shall not construct or fix under such pan, basin, or receptacle, any "container" or other similar fitting.

He shall construct or fix immediately beneath or in connection with such pan, basin, or other suitable receptacle, an efficient siphon trap, so constructed that it shall at all times maintain a sufficient water seal between such pan, basin, or other

suitable receptacle, and any drain or soil pipe in connection therewith; he shall not construct or fix in or in connection with the watercloset apparatus any D trap or other similar trap.

* * * * *

[NOTE.—*The last paragraph of byelaw 3, and the whole of byelaw 4 have been repealed by a byelaw made by the Council on July 26, 1899, and sanctioned by the Local Government Board on June 14, 1901.*]

5. A person who shall newly fit or fix any apparatus in connection with any existing watercloset, shall, as regards such apparatus and its connection with any soil pipe or drain, comply with such of the requirements of the foregoing byelaws as would be applicable to the apparatus so fitted or fixed if the watercloset were being newly constructed.

Earthclosets.

6. Every person who shall construct an earthcloset in connection with a building shall furnish such earthcloset with a reservoir or receptacle, of suitable construction and of adequate capacity, for dry earth, and he shall construct and fix such reservoir or receptacle in such a manner and in such a position as to admit of ready access to such reservoir or receptacle for the purpose of depositing therein the necessary supply of dry earth.

He shall construct or fix in connection with such reservoir or receptacle suitable means or apparatus for the frequent and effectual application of a sufficient quantity of dry earth to any filth which may from time to time be deposited in any receptacle for filth constructed, fitted, or used, in or in connection with such earthcloset.

He shall construct such earthcloset so that the contents of such reservoir or receptacle may not at any time be exposed to any rainfall or to the drainage of any waste water or liquid refuse from any premises.

7. Every person who shall construct an earthcloset in connection with a building shall construct such earthcloset for use in combination with a movable receptacle for filth.

He shall construct such earthcloset so as to admit of a movable receptacle for filth, of a capacity not exceeding two cubic feet, being placed and fitted beneath the seat in such a manner and in such a position as may effectually prevent the deposit upon the floor or sides of the space beneath such seat, or elsewhere than in such receptacle, of any filth which may from time to time fall or be cast through the aperture in such seat.

He shall construct such receptacle for filth in such a manner and in such a position as to admit of the frequent and effectual application of a sufficient quantity of dry earth to any filth which may be from time to time deposited in such receptacle for filth, and in such a manner and in such a position as to admit of ready access for the purpose of removing the contents thereof.

He shall also construct such earthcloset so that the contents of such receptacle for filth may not at any time be exposed to any rainfall or to the drainage of any waste water or liquid refuse from any premises.

Privies.

8. Every person who shall construct a privy in connection with a building shall construct such privy at a distance of twenty feet at the least from a dwelling-house, or public building, or any building in which any person may be or may be intended to be employed in any manufacture, trade, or business.

9. A person who shall construct a privy in connection with a building shall not construct such privy within the distance of one hundred feet from any well, spring, or stream of water used, or likely to be used, by man for drinking or domestic purposes, or for manufacturing drinks for the use of man, or otherwise in such a position as to render any such water liable to pollution.

10. Every person who shall construct a privy in connection with a building shall construct such privy in such a manner and in such a position as to afford ready means of access to such privy, for the purpose of cleansing such privy and of removing filth therefrom, and in such a manner and in such a position as to admit of all filth being removed from such privy, and from the premises to which such privy may belong, without being carried through any dwelling-house, or public building, or any

building in which any person may be or may be intended to be employed in any manufacture, trade, or business.

11. Every person who shall construct a privy in connection with a building shall provide such privy with a sufficient opening for ventilation as near to the top as practicable and communicating directly with the external air.

He shall cause the floor of such privy to be flagged or paved with hard tiles or other non-absorbent material, and he shall construct such floor so that it shall be in every part thereof at a height of not less than six inches above the level of the surface of the ground adjoining such privy, and so that such floor shall have a fall or inclination towards the door of such privy of half an inch to the foot.

12. Every person who shall construct a privy in connection with a building shall construct such privy for use in combination with a movable receptacle for filth, and shall construct over the whole area of the space immediately beneath the seat of such privy a floor of flagging or asphalt or some suitable composite material, at a height of not less than three inches above the level of the surface of the ground adjoining such privy; and he shall cause the whole extent of each side of such space between the floor and the seat, other than any part that may be occupied by any door or other opening therein, to be constructed of flagging, slate, or good brickwork, at least nine inches thick, and rendered in good cement or asphalted.

He shall construct the seat of such privy, the aperture in such seat, and the space beneath such seat, of such dimensions as to admit of a movable receptacle for filth of a capacity not exceeding two cubic feet being placed and fitted beneath such seat in such a manner and in such a position as may effectually prevent the deposit, upon the floor or sides of the space beneath such seat or elsewhere than in such receptacle, of any filth which may from time to time fall or be cast through the aperture in such seat.

He shall construct such privy so that for the purpose of cleansing the space beneath the seat, or of removing therefrom or placing or fitting therein an appropriate receptacle for filth, there shall be a door or other opening in the back or one of the sides thereof, capable of being opened from the outside of the privy, or, in any case where such a mode of construction may be impracticable, so that for the purposes aforesaid the whole of the seat of the privy or a sufficient part thereof may be readily moved or adjusted.

13. A person who shall construct a privy in connection with a building shall not cause or suffer any part of the space under the seat of such privy, or any part of any receptacle for filth in or in connection with such privy, to communicate with any drain.

Waterclosets, earthclosets, and privies.

14. Every person who shall intend to construct any watercloset, earthcloset, or privy, or to fit or fix in or in connection with any watercloset, earthcloset, or privy any apparatus or any trap or soil pipe, shall, before executing any such works, give notice in writing to the clerk of the Sanitary Authority. (y)

Earthclosets and privies.

15. Every owner of an earthcloset or privy existing at the date of the confirmation of these byelaws shall, before the expiration of six months from and after such date of confirmation, cause the same to be reconstructed in such manner that its position, structure, and apparatus shall comply with such of the requirements of the foregoing byelaws as are applicable to earthclosets or privies newly constructed.

Ashpits.

16. When any person shall provide an ashpit in connection with a building, he shall cause the same to consist of one or more movable receptacles sufficient to contain the house refuse which may accumulate during any period not exceeding one week. Each of such receptacles shall be constructed of metal and shall be provided with one

(y) The latter part of this byelaw applies to waterclosets constructed before the byelaw was made, as well as to new waterclosets; and a person who, in London, intends to furnish an old watercloset with a new pan and trap, must give notice accordingly: *L. & S. W. Ry. v. Hill* (1906), 5 L. J. K. 399.

or more suitable handles and cover. The capacity of each of such receptacles shall not exceed two cubic feet.

Provided that the requirement as to the size of each of such receptacles shall not apply to any person who shall construct such receptacle or receptacles in connection with any premises to which there is attached as part of the conditions of tenancy the right to dispose of house refuse in an ashpit used in common by the occupiers of several tenancies, but in no case shall such ashpit be of greater capacity than is required to enable it to contain the refuse which may accumulate during any period not exceeding one week.

17. The occupier of any premises who shall use any ashpit shall, if such ashpit consist of a movable receptacle, cause such receptacle to be kept in a covered place, or to be properly covered, so that it shall not be exposed to rainfall, and if such ashpit consist of a fixed receptacle, he shall cause the same to be kept properly covered.

18. Where the Sanitary Authority have arranged for the daily removal of house refuse in their district, or in any part thereof, the owner of any premises in such district or part thereof shall provide an ashpit which shall consist of one or more movable receptacles, sufficient to contain the house refuse which may accumulate during any period not exceeding three days, which the Sanitary Authority may determine, and of which the Sanitary Authority shall give notice by public announcement in their district. Each of such receptacles shall be constructed of metal, and provided with one or more suitable handles and cover. The capacity of each of such receptacles shall not exceed two cubic feet.

Provided always that this byelaw shall not apply to the owner of any premises until the expiration of three months after the Sanitary Authority have publicly notified their intention to adopt a system of daily collection of house refuse in that part of their district which comprises such premises.

19. Where any receptacle shall have been provided as an ashpit for any premises in pursuance of any byelaw in that behalf, no person shall deposit the house refuse which may accumulate on such premises in any ashpit that does not comply with the requirements of these byelaws.

Cesspools.

20. Every person who shall construct a cesspool in connection with a building, shall construct such cesspool at a distance of one hundred feet at the least from a dwelling-house, or public building, or any building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business. (z)

21. A person who shall construct a cesspool in connection with a building, shall not construct such cesspool within the distance of one hundred feet from any well, spring, or stream of water.

22. Every person who shall construct a cesspool in connection with a building, shall construct such cesspool in such a manner and such a position as to afford ready means of access to such cesspool, for the purpose of cleansing such cesspool, and of removing the contents thereof, and in such a manner and in such a position as to admit of the contents of such cesspool being removed therefrom, and from the premises to which such cesspool may belong, without being carried through any dwelling-house, or public building, or any building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business.

He shall not in any case construct such cesspool so that it shall have, by drain or otherwise, any means of communication with any sewer or any overflow outlet. (a)

23. Every person who shall construct a cesspool in connection with a building, shall construct such cesspool of good brickwork, bedded and grouted in cement, properly rendered inside with cement, and with a backing of at least nine inches of well-puddled clay around and beneath such brickwork, and so that such cesspool shall be perfectly watertight.

He shall also cause such cesspool to be arched or otherwise properly covered over, and to be provided with adequate means of ventilation.

(z) It seems that such a byelaw is not unreasonable merely from the fact that it may be impossible, in a particular instance, to construct a cesspool within the prescribed distance: *Simmons v. Mallory R. C.* (1897), 2 Q. B. 433; 65 L. J. Q. B. 585; 77 L. T. 341; 45 W. R. 603; 61 J. P. 502.

(a) See *Button v. Tottenham U. C.* (1898), 78 L. T. 470; 62 J. P. 423.

Receptacles for dung.

24. A person shall not use as a receptacle for dung any receptacle so constructed or placed that one of its sides shall be formed by the wall of any room used for human habitation, or under a dwelling-house, factory, workshop, or workplace, and he shall not use any receptacle in such a situation that it would be likely to cause a nuisance or become injurious or dangerous to health.

25. Every owner of any existing receptacle for dung shall, before the expiration of six months from the date of the confirmation of these byelaws, and every person who shall construct a receptacle for dung shall cause such receptacle to be so constructed that its capacity shall not be greater than two cubic yards, and so that the bottom or floor thereof shall not, in any case, be lower than the surface of the ground adjoining such receptacle.

He shall so construct such receptacle that a sufficient part of one of its sides shall be readily removable for the purpose of facilitating cleansing.

He shall also cause such receptacle to be constructed in such a manner and of such materials, and to be maintained at all times in such a condition, as to prevent any escape of the contents thereof, or any leakage therefrom into the ground or into the wall of any building.

He shall cause such receptacle to be so constructed that no rain or water can enter therein, and that it shall be freely ventilated into the external air.

Provided that a person who shall construct a receptacle for dung, the whole of the contents of which are removed not less frequently than every forty-eight hours, shall not be required to construct such receptacle so that its capacity shall not be greater than two cubic yards.

And provided that a person who shall construct a receptacle for dung, which shall contain only dung of horses, asses, or mules, with stable litter, and the whole of the contents of which are removed not less frequently than every forty-eight hours, may, instead of all other requirements of this byelaw, construct a metal cage, and shall beneath such metal cage adequately pave the ground at a level not lower than the surrounding ground, and in such a manner and to such an extent as will prevent any leakage into the ground; and if such cage be placed near to or against any building he shall adequately cement the wall of such building in such a manner and to such an extent as will prevent any leakage from the dung within or upon such receptacle into the wall of such building.

26. [NOTE—By-law No. 26 has been repealed by a byelaw made by the Council on Nov. 10, 1904, and replaced by another byelaw of the same date. It may be found set out in the London County Council Byelaws (1905), at p. 62.]

Maintenance of closets, etc.

27. The owner of any premises shall maintain in proper condition of repair every water-closet, earth-closet, privy, ashpit, cess-pool, and receptacle for dung, and the proper accessories thereof belonging to such premises.

Penalties.

28. Every person who shall offend against any of the foregoing byelaws shall be liable for every such offence to a penalty of five pounds, and in the case of a continuing offence to a further penalty of forty shillings for each day after written notice of the offence from the sanitary authority. Provided, nevertheless, that the Court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if the Court think fit, adjudge the payment as a penalty of any sum less than the full amount of the penalty imposed by this by-law.

APPENDIX OF UNREPORTED CASES.*

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[IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION.]

[Phillimore, J.]

(1) DOWSETT v. RAMUZ. (a)

1905.
Aug.

*Building estate—Building line—Restrictive covenant—Infringement—
Injunction.*

Where the purchaser of a plot forming part of a building estate exceeds the building line, and the vendor, who builds on the adjacent plot, exceeds the line to the same extent, the vendor cannot maintain an action for injunction. But if the purchaser or purchaser's successor in title, who is bound by the covenant, exceeds the line to a greater extent, he may be restrained.

This was an action by the plaintiff for an injunction to restrain the defendant from building in Victoria Avenue, Southend-on-Sea, beyond the building line mentioned in a deed of conveyance, dated October 26, 1878, and in alleged breach of covenants contained therein.

The defence was a denial that the plaintiff was entitled to an injunction.

The plaintiff's case was that on October 26, 1878, certain property, part of the Milton Hall estate, Southend-on-Sea, was conveyed to a Mr. Hudson, the conveyance containing a covenant by the purchaser that no buildings should be erected on the land conveyed between the building line, 35 ft. from the road, and the roadway shown on the plan, except for a c. Hudson subsequently erected a house, called Eden House, upon the land, the main part of which stood back 35 ft. 6 ins. on each side of the lay, and the lay 32 ft. 5 in. from the road. In 1881 the plaintiff built a house on the adjoining piece of land, the frontage being the same distance from the road. The plaintiff alleged that it

* None of the cases in this Appendix are reported in the ordinary Law Reports. Most of them have been compiled from *The Builder*, with the kind permission of the editor of that journal.

(a) Taken from the *Builder*, Aug. 19, 1905, p. 192. As to building line generally, see p. 227, *ante*.

1905.

DOWSETT v.
RAMUZ.

Phillimore, J.

was the custom at Southend to permit owners to bring forward their bay windows slightly beyond the stipulated building line. In 1904 the defendant purchased Eton House, and purported to convert the house on the ground floor into shops, and deposited plans, which were passed, showing that the building line of the house would be brought forward to 32 ft. 4½ ins. from the road. The plaintiff's case was that this would be prejudicial to all the other purchasers who had bought on the same conditions.

Mr. Acland, K.C., and Mr. C. Herbert Smith appeared for the plaintiff; and Mr. W. H. Upjohn, K.C., and Mr. Edward Ford for the defendant.

On behalf of the defendant, it was argued that Hudson bought the land on which his house was erected on the footing that there was a building line, and when the plaintiff broke the stipulation he deprived Hudson of the benefit stipulated for. It was also contended that there was no case in the books where a plaintiff was held to be entitled to enforce a covenant which he had himself broken. (b)

Mr. Justice Phillimore, in giving judgment, said the defendant's house was the first to be built, and the bay windows were infringements of the building line. The plaintiff then built, and had infringed by building bay windows. That fact prevented the plaintiff from compelling the defendant to pull down the bay windows, but it did not entitle the defendant further to infringe the building line. If the defendant's infringement was an equivalent to that of the plaintiff's, the plaintiff could not recover. In this case the plaintiff and defendant had been equal sinners, and the defendant proposed to add to his breach in the same way as he had already committed a breach. Upon the whole, he thought it was not only an excess, but so great an excess that it ought to be restrained. He accordingly granted an injunction restraining the defendant from building as shown in the plans deposited by him with the Town Council and passed by them.

[IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION.]

[Before Bigham, J.]

(2) BYWATERS & SONS v. CARNICK & CO. (c)

1905,
Nov. 15,

Building contract—Bonus for expedition—Delay in allowing builder to commence.

Where it was agreed that the builder should have a *bonus* of £360 if part of the work was completed within nine weeks, and the work, having been in progress for one week, was stopped owing to a party wall dispute between the building owner and his neighbour, and was not recommenced for more than a month: *Held*, that the builder was entitled to recover the *bonus*. (d)

This was a claim preferred by a firm of builders to recover a sum of £360, which the defendants had deducted from the balance due to the plaintiffs for certain building work.

Mr. Hudson, who appeared for the plaintiffs, said that it was mentioned in some of the letters that this amount was a *bonus*, but the effect of it was that it was really a penalty. The answer made by the defendants was that the plaintiffs did not complete to time, and to that the plaintiffs replied that the defendants never gave them possession of the site to enable them to do the work, and there were numerous extras and alterations. The contract was partly verbal and partly in writing.

Mr. Justice Bigham asked if there was any provision in the contract for penalties.

(b) See cases cited, *ante*, p. 248.

(c) *Builder*, Nov. 28, 1905, p. 571.

(d) As to *bonus* clauses generally, see p. 150, *ante*.

Mr. Hudson replied in the negative. He said the plaintiffs tendered for the work, the pulling down and re-erection of certain premises in Gloucehouse Street, W., and their tender was for £12,395. The time for the completion of the work was thirty-six weeks. The tender was accepted on February 4, 1903, and the time was to run from that date. Plaintiffs also offered to do the work in twenty-six weeks if they had an additional £1100. An interview took place between plaintiffs and Mr. Robinson, defendants' architect, and then it was arranged that the ground floor and basement should be completed in nine weeks. That was part of the contract, and the plaintiffs were to have the £360 claimed if it were completed within that period. The work, it was agreed, was completed on May 16. The whole dispute arose as to the date of the commencement of the work. The plaintiffs said they started on February 11, but that then they were stopped owing to a party wall dispute, and his clients said the award in the dispute was not obtained with proper diligence. In the result they did not really start the work until March 16. His contention was that the £360 was added to the contract price, and therefore the defendants were liable to pay it. Having been prevented from completing by the specified date by extra and not getting possession of the site, he contended that his clients were entitled to the amount claimed.

Mr. Morton Smith, for the defendants, said his contention was that the time expended in pulling down the building and party wall and the erection of certain screens was included in the plaintiffs' contract.

Mr. Hudson said his case was that the plaintiffs were stopped in their work from a date in February to early in March, and that this time must be deducted from the contract time.

Mr. Morton Smith admitted that the party wall could not be touched until March 3, but his contention was that there was plenty of work which the plaintiffs could have got on with whilst waiting for the party wall award.

Mr. Justice Bigham, in giving judgment, said he thought he must find for the plaintiffs. The plaintiffs promised that they would deliver up possession of the basement and ground floor of the premises in question within nine weeks from the date of the commencement of the work, which meant from the date of the commencement of the contract work, and defendants agreed that in consideration of that promise and the performance of it they would pay the plaintiffs a bonus of £360. The work, it had been agreed, was not completed within nine weeks. The only question he had to determine was to whom was this circumstance to be attributed. To his mind the defendants, by their action in not getting the party wall award, had prevented the plaintiffs from earning this money. He also thought that additional work had been ordered by the defendants during the progress of the work in the basement and on the ground floor, and this work delayed the plaintiffs in the execution of this work, and delayed them in executing the work required of them within the nine weeks. It was the defendants' acts and the defendants' fault that the work was not completed within the contract time. He accordingly gave judgment for the plaintiffs for £360 and costs.

1903.
—
BEWATERS
& SONS v.
CARSTEN
& CO.
—
Bigham, J.

[IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION.]

[Before Farwell, J., sitting as an additional judge of the K.B.D.]

(3) STENNING v. MITCHELL & CO. (c)

Architect—Remuneration—Absence of agreement—Hyde's scale.

In an action by an architect and surveyor for fees, where there had been no agreement: *Held*, that although in the circumstances of the case Hyde's scale was

1901.
May 11.

1904.
STENNING v.
MITCHELL
& Co.
—
Farwell, J.
—

applicable, it was not always applicable. The court must consider the work done in each particular case. (*f*)

This was an action brought by the plaintiff, Mr. A. R. Stenning, an architect and surveyor, for £166 19s., fees for services rendered to the defendants in connection with the taking over by the London County Council of property belonging to the defendants in Drury Lane under the Lands Clauses Acts.

Mr. H. F. Dickens, K.C., and Mr. H. Smith appeared for the plaintiff, and Mr. Ernest Pollock for the defendants.

It appeared from the statement of Mr. Dickens that in 1900 the defendants, on receiving notice to treat under the Act, retained the plaintiff as their leading surveyor, so that he should have the conduct of the matter throughout. Negotiations continued from February, 1900 to 1902, but afterwards the parties went to arbitration, and in March, 1902, the arbitrator issued his award, awarding Messrs. J. Mitchell & Co. £18,195 compensation. According to Ryde's scale, plaintiff's fees for his ordinary duties as a surveyor in the case amounted to £109 4s. It was admitted, however, that, apart from the ordinary work which surveyors usually did in these cases, the plaintiff did a large amount of extra work, for which he made a charge of fifty guineas.

The defence was that plaintiff's charges were unreasonable, and defendants paid a sum of money into court as being sufficient to meet the plaintiff's claim.

Mr. Justice Farwell, in giving judgment, said the question for decision was one purely of fact on the circumstances of the case—viz., what was a fair and reasonable remuneration to be paid to the plaintiff by the defendants for his services. No custom was alleged, nor was any express agreement stated or proved, nor, so far as he had heard, was Ryde's or any other scale mentioned when plaintiff was engaged. Nothing was said about remuneration. Ryde's scale had certainly not been established as the customary scale upon which surveyors could insist upon receiving. He thought he might say it was a scale which surveyors usually desired to receive. In the present case, what he had to consider was a reasonable amount to give the plaintiff. To some extent he quite agreed it was very undesirable to pay by percentage on the amount, but, owing to the exigencies and the difficulties of business, it was the practice usually adopted by the court in taxation. So that he was bound to accept that as the proper mode of ascertaining remuneration. It did not at all follow that, because he thought that in this case Ryde's scale applied, it was always applicable. Far from it. (*g*) He had to consider the work done in each particular case. In the present case there were three heads of work to be considered—first, there was the ordinary work done by the surveyor as witness; secondly, there was the work which he did in a *quasi* consultative capacity in preparing the evidence, advising, negotiating, and trying to settle so as to avoid litigation; thirdly, there was work which the plaintiff did in connection with alternate sites suggested instead of money compensation. Three sites were proposed by the London County Council and one by the plaintiff, and these were advised on by the plaintiff. As regarded the preliminary advising and the ordinary surveyor's evidence at the arbitration, having regard to the special circumstances of the case and to the length of time to which the matter extended, his lordship thought a reasonable sum to allow the plaintiff on that head was that specified in Ryde's scale. For the extra work which the plaintiff had done, he allowed forty guineas more.

Judgment for the plaintiff accordingly.

(*f*) See generally as to Ryde's scale, *ante*, pp. 13, 472.

(*g*) Cf. *Buckland v. Pawson* (1890), 6 T. L. R. 421, noted *ante*, p. 13.

[IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.]

[Before Romer, J.]

1. CLARKE v. WADDINGTON, &c.

1898,
July 22.

Restrictive covenants—Covenant not to erect "building"—Substitution of stone steps for iron ladder—Covenant against altering "elevation"—Enlarging a door—Declaration of breach.

A deed of conveyance contained a covenant by the defendants to erect certain buildings, and a further covenant to the effect that "no other . . . building . . . shall at any time be erected upon such piece of land, except with the approval" mentioned in the deed. The defendants erected stone steps in substitution for an iron ladder. *Held*, that this was a substantial alteration which amounted to the erection of a separate building. The deed contained a further covenant that "elevation" should not be altered without consent in writing. The defendant enlarged a door 3 ft. 6 ins. wide to 4 ft. 6 ins. *Held*, that this was a substantial alteration in one of the elevations of the building.

This was a motion for an injunction to restrain the defendant from building in breach of certain restrictive covenants, and, as the question turned on the covenants, it was agreed to treat this motion as the trial of the action. It appeared that the plaintiff was the owner of an estate at Scarborough, and was the successor in title of a Mr. John Skelton. The portion of the estate in regard to which the present proceedings were taken was conveyed by Mr. John Skelton to the defendant, and upon it had been erected the Lonsborough Theatre. It was in respect of this theatre that the plaintiff said the breaches of the covenant had been committed. One of the covenants was that the defendants should not erect any other building beyond those agreed upon without the consent of the owner of the estate. What the defendant had done was to erect certain stone steps up an exit at the back. That was one breach, and a second was in respect of a door. There was a door 3 ft. 6 ins. wide which the defendant had enlarged to 4 ft. 6 ins., and this was proposed to be used as an exit. This exit in the enlarged form would, it was said, become an intolerable nuisance to the plaintiff's tenants, whose back premises the audience would pass.

Mr. Justice Romer, in giving judgment, said that what motive the plaintiff might have in bringing this action he was not concerned with, and the only question before him was as to the construction of the covenants with reference to the matters complained of. In the deed of conveyance there was a covenant by the grantees for the erection of certain buildings, and it contained these words: "Also that no other place of amusement, shop, building, entrance gate, wall, or fence shall at any time be built or erected upon such piece of land, except with the approval" mentioned in the deed. He agreed that the word "building" must have a reasonable interpretation, and it was not every trifling alteration of the premises that was meant by a "building" within the meaning of the word as used in the covenant. At the same time, he did not see any reason for unduly restricting the meaning of the word "building." The question was, did the steps which had been erected amount to a "building" within the meaning of the word in the covenant? Seeing they were in substitution for what before was an iron ladder, it appeared to his lordship that these steps did amount substantially to a "building," and therefore that it was a breach of the covenant. In the deed of conveyance there was a further covenant that the elevations should not be altered without consent in writing, but the use of the word "elevation" showed it was not confined to the front elevation. In his lordship's opinion, a very important part of the elevation was the size and position of windows and doors, and an alteration of a substantial character in the size or position of the windows, with entrances in the front or sides of the building, would be a breach of the covenant. The doorway to which his

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attention had been called was in one of the elevations, and, in his opinion, the alteration which had been made was a substantial one, and he therefore held that that also was a breach of the covenant.

Mr. Levett said that the really substantial question was that the door should not be used as a general exit, but there would be no objection to its being used on an emergency.

His lordship then made a declaration that what had been done was a breach of the covenants, with liberty to apply for an injunction; the defendant to pay the costs.

Order accordingly.

[IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.]

[Before Pollock, B., and Day, J.]

(5) LORDEN & SON v. PRYCE. (i)

1896.
April 20.

Building contract—Extras—Authority of architect—Effect of final certificate.

A building contract contained the usual clause referring questions which might arise to the architect, and another clause (18) requiring that orders for extras were to be signed by the secretary and treasurer, and countersigned by the architect. The builder having completed the work, the architect issued a final certificate which apparently included certain extras which had not been signed for by the secretary and treasurer. *Held*, that the architect having no power either by direction or by consent or waiver to get rid of clause 18, the plaintiffs were not entitled to recover the cost of extras, although included in the final certificate.

This case came before the Divisional Court by way of an appeal by the plaintiff from a judgment of Mr. Verey, the Official Referee.

Mr. Scott appeared as counsel for the appellants, and Mr. Willes Chitty for the respondents.

It appeared from the statement of Mr. Scott that the plaintiffs were builders, and the defendants a committee of gentlemen representing a religious body who employed the plaintiffs to build a chapel at Wimbledon, the contract entered into being dated November 25, 1894. The contract sum for doing the work was £3688, the contract being in the usual form, and containing the usual stipulations. The builders commenced to do the work, and amongst other things in the contract they had to provide additional sums for certain classes of work, amongst others being a sum of £160 for heating and gas-fittings. In the autumn of 1895 some question arose as to who should pay the sub-contractors for the amount of work they were employed to do by the plaintiffs, and it was ultimately arranged that £120 should be taken out of the £3688, the defendants paying that direct to the sub-contractors, so that it reduced the amount due to the plaintiffs to £3568. The plaintiffs were paid during the progress of the work, and before the final certificate of the architect, the sum of £3600, and they claimed in the action the sum of £133 8s. 2d. beyond that as per the architect's certificate of August 25, 1895, and the point at issue was whether the architect's certificate was binding on the defendants or not.

Baron Pollock: That makes it more.

Mr. Scott replied that the plaintiffs were claiming for extra work besides. The learned counsel said that he contended that, under the terms of the contract, the architect's certificate was final in the absence of fraud, but the learned Official Referee took a different view.

Mr. Baron Pollock, without calling upon the counsel for the respondents, in giving judgment, said that the case no doubt involved a question of great practical importance, because it dealt with the construction of a contract which was of

(i) *Builder*, April 25, 1896, p. 369. See generally, as to orders for extras, *ante*, p. 132.

common daily occurrence; but he thought when that had been said, that it was as clear as anything could be clear that on the point of law in the present case the Official Referee had come to a correct conclusion. The Referee had to decide whether the allowance which was due to the plaintiffs of £133 8s. 2d. the amount charged for extras under the contract in question—was legally due from the defendants. The defendants and the plaintiffs, to his mind, had entered into a contract by which they had clearly defined what was the contract between them and what powers were given to the architect who acted on the part of the defendants. The only power given to the architect was by clause 2 of the general conditions of the contract, which provided that any question which might arise as to the materials, workmanship, delay, mode of executing the work, interpretation of drawings, quantities, specifications, etc., should be submitted to the architect, "whose certificate given on any point in accordance with the provisions here in shall be final and binding on the contractor without appeal." The learned judge, continuing, said that clause 18, however, laid down as clearly as possible that if any extras were required the order was to be signed by the treasurer and secretary, and countersigned by the architect, and upon the words contained in these two clauses it seemed to him perfectly clear that the architect had no power whatever, either by way of direction or by way of consent or waiver, in any way to get rid of clause 18. To hold that he could do so would be to say that he could make a new contract for the parties, and set aside the contract already entered into.

Mr. Justice Day concurred, and the appeal was dismissed with costs.

[IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.]

[Before Mr. Justice Denman.]

(6) SCHOOL BOARD FOR LONDON v. JOHNSON. (k)

Building contract—Action to recover cost of making good deviations appearing after completion—Minor deviations—Contributory negligence of employers and their agents in surveillance.

The defendant was a builder, who had done work for the London School Board upon three contracts in reference to as many schools, and the present action was brought against him to recover sums amounting to £3670 in all, in respect of default in connection with the performance of these contracts. The action came on for trial before his lordship in May, 1891, when, after some discussion, it was arranged that the dispute should be referred to an arbitrator to be named by him, and who should report to him. He named Mr. Henry A. Hunt, a surveyor, who, after having held sittings, which extended over twenty-four days, made his report, and the matter came on for argument before his lordship early in the present sittings. Upon that occasion it was suggested by the plaintiffs that his lordship should have further communication with Mr. Hunt, and should postpone judgment until this had been done.

Mr. Justice Denman said that the plaintiffs sued the defendant to recover a large sum of money in respect of work done, or omitted to be done, by him some years before the action was brought upon three contracts in reference to three Board schools. The defendant had been paid upon the architect's certificate, but it was contended that the School Board were entitled to have damages, notwithstanding the lapse of time that had taken place, and the fact that the architect's certificate had been given. His lordship went through the conditions, which provided, among other things, that the contracts should be executed with the best materials and with skilful workmanship, and to the satisfaction of the architect. Further, that if within four months of the completion of the works any defect arising from improper material or workmanship should be found, the

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contractor should make it good at his own cost. The certificate of the architect, showing the final balance due to the contractor, should be conclusive evidence that the work had been completed, and that the balance was payable; but without prejudice to the contractor being liable in a certain event. Then came Clause 22, which provided that no final or any other certificate should relieve the contractor from any fraud, default, or wilful deviation from his contract; but that he should remain for four years liable for such acts. The plaintiffs alleged that there had been fraud, default, or deviation from the contract, and that by reason of this they had suffered loss and damage. When the case came on for trial he (Mr. Justice Denman) expressed the opinion that to entitle the plaintiffs to recover they must show that there had been something in the nature of "scamping" work; and it was arranged that upon the report of the arbitrator, he should direct judgment, from which judgment there should be no appeal. The arbitrator was to report whether the defendant had been guilty of fraud, default, or wilful deviation from his contract; whether there had been "scamping" of the work with a view to his own interest; or wilful deviation from the contract with the same view. Since the case was last before the Court, his Lordship said that he had seen Mr. Hunt, and had also carefully gone through the shorthand-writers' notes of the proceedings before him, and he had no doubt of the correctness of the conclusions at which that gentleman had arrived. He had found that the defendant was not personally guilty of fraud, but that to a certain extent a plumber was guilty in laying light lead in the gutters to the extent of 7 cwt., and of the value of £5 5s. He reported that, generally, the work had been well done—notably, the lead work, the joiners' work, the plasterers' work, and the brick and stone work; and that, although there were serious failures in the drainage work of at least one school, he did not consider that the work, as a whole, had been scamped. He then referred to various deviations from the contract that had taken place under certain circumstances; and, in conclusion, he remarked that the defects that had manifested themselves in the buildings could not have existed without the contributory negligence of the School Board and its agents. His Lordship said that, even assuming that there was some blame to the defendant's foreman in reference to work done and to deviation from the contracts in reference to the drains, he thought that Mr. Hunt was right in saying that the deviation was not intended to put money into the defendant's pocket, but was due rather to the loose surveillance of the foremen and clerks of the works. Upon the whole he (Mr. Justice Denman) had no hesitation in giving judgment for the defendant, with costs.

[IN THE COURT OF APPEAL.]

[Before Esher, M.R., Lopes and Kay, L.JJ.]

1895.
 Dec.

ROOME v. HACKNEY BATH COMMISSIONERS. (l)

Building contract—Suspension of work in breach of contract—Arbitration to assess amount due to builder—Award—Whether sum awarded can be retained to secure extra cost of completion.

The defendants having wrongfully seized the works which had been partly performed under a building contract, the plaintiff sued for damages for breach of contract. The damages were assessed by an arbitrator. In an action upon the award, the defendants claimed to retain all or part of the amount due under the award as security for the extra cost of completing the work. *Held*, that the non-completion was due to the defendants' breach of contract, and that the plaintiff was entitled to judgment.

This was an appeal by the Hackney Baths Commissioners from the order of

(l) *Builder*, Dec. 17, 1895, p. 429.

Mr. Justice Wright at Chambers giving Mr. Roome leave to enforce an award dated September 6, 1895, as though it were a judgment.

The matter arose out of a contract dated February 16, 1894, under which Mr. Roome contracted to build public baths at Hackney for £36,608. The works were suspended in October, 1894, and Mr. Roome made certain claims which were dealt with by arbitration. The award of Mr. Cubitt Nichols, the arbitrator, was given in September last, and he awarded £3321 to be paid to Mr. Roome in final settlement of all his claims, and gave him the costs of the arbitration and award. The Commissioners claimed to retain the £3321, or alternatively some part of it, under Clause 22 of their contract, as security for extra cost of completing the baths.

Mr. Montan, Q.C., and Mr. Macnorton appeared for the appellants, the Commissioners; and Mr. Dickens, Q.C., and Mr. R. M. Bray for the respondent, Mr. Roome, the contractor.

The Master of the Rolls, in his judgment, said: "I am of opinion the appeal must be dismissed. No fault is found now with the award as an award, but what is said is, the judge ought not to have made the order. Now what is it that is given by the award? Here is the contractor who has done work for these Commissioners, and it is true to say that the Commissioners took possession of all the work that he had done, and of all his tools and of his plant, and thereupon he complains. What did he complain of? The particulars, which he was ordered to give, show what he did complain of. He says 'You took possession of my things, and prevented me fulfilling the contract, but what I complain of is, that it was your fault which prevented me from finishing the work. I cannot say that you were not entitled to take possession because I have not finished the work; but what I complain of is, that your man, by gross misconduct, not only with regard to the work which I was carrying on with my workmen, but also by misconduct with the tradesmen who were supplying me with goods, your clerk of the works, prevented me from finishing my contract, and you stipulated that you would not interfere with my work, and you ought to pay me damages, inasmuch as they are caused by a breach of contract by you.' Now, if the breach of contract was established, what was the remedy? Damages, and nothing else. What would be these damages? By their breach they may have brought it within the terms of the 22nd Clause of the contract, but it was a breach of the 19th Clause. If that were true, what were his damages? Why, the difference between the condition he would have been in if they had not committed that breach, and the condition in which he was when they had committed that breach. If they had not committed that breach he would have been entitled to the value of the work which he had done, but he could not claim that because he had not finished the work, and he did not give up the work voluntarily, but because they prevented him from doing the work. The moment that was established, the value of the work that he had done was part of the damages. But that was not all. He was prevented from earning the rest of his part of the contract, that is, the profit that he would have made if he had carried on the work. Whether the arbitrator has now given more damages than he ought, is immaterial. There is the award, which is in terms perfectly plain, that the Commissioners were bound to pay £3321. What for? 'In full satisfaction and discharge of all claims and demands whatsoever of the said Roome against the said Commissioners under the said contract, or in respect of any breach thereof.' The truth is that these damages are not given in respect of the contract and under the contract, but in respect of a breach of it, that breach being that they prevented him from finishing the work. That being so, there is an absolutely good award, a final award, and it is specific, an award that they should pay him the money at once. I cannot say that the judge was wrong. I am perfectly certain that he was absolutely right in saying upon such an award that there should be no delay. It is an award for damages, and therefore there is no power on their part to retain the money. They are bound to pay it at once. I think the learned judge was right, and this appeal must be dismissed."

Lord Justices Lopes and Kay concurred, and the appeal was dismissed with costs.

1895.

Roome v.
Hackney
Bath Com-
missioners.

Esler, M.B.,
Lopes and
Kay, J.J.

[IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION.]

[Before Mr. Justice Bruce.]

(8) SMITH *v.* JOHNSON. (*m*)1893.
Feb. 1.
—*Building materials—Mortar—Supply of defective mortar—Mortar used in building—Building required to be pulled down—Damages.*

The defendant, in building a house for the plaintiff, used mortar which was compounded otherwise than in accordance with the byelaws in force in the County of London, in consequence of which the plaintiff was compelled by the County Council to pull down and rebuild. In an action for damages it was held that, inasmuch as the plaintiff had no reasonable opportunity of inspecting and rejecting the mortar, he was entitled to recover the full cost of pulling down and rebuilding, and also damages for the loss of ground rent.

The plaintiff, a lodging-house keeper in Whitechapel, employed the defendant, a builder and contractor, to build a dormitory to one of his lodging-houses, and contracted with the defendant to supply the mortar. The mortar was supplied and the building erected. After the building had been erected the plaintiff was served with a notice from the London County Council to pull down and rebuild, on the ground that the mortar was not composed of one part of lime to three parts of grit or sand, in accordance with the London Building Act of 1894. (*n*) The plaintiff, in accordance with the notice, pulled down and rebuilt, and brought an action to recover from the defendant the whole cost of pulling down and rebuilding, and also the loss of ground-rent. It was proved that the mortar was defective, and his lordship found that it was so supplied by the defendant. The plaintiff also proved that in a wet state the inferior quality of the mortar could not be detected.

Mr. Rufus Isaacs, Q.C., and Mr. Groser appeared for the plaintiff, and Mr. McIntyre for the defendant.

Mr. Rufus Isaacs argued that the damages were the natural consequence of the defendant's act, and that the test was whether the defective quality of the mortar could have been detected before being used. He submitted that it could not, and that the defendant was liable for what happened by its use.

On the other hand, Mr. McIntyre contended that the damages were too remote. He submitted that it could not have been in the contemplation of the parties that if the mortar was bad, the plaintiff would have to pull down and rebuild. If the defendant supplied bad mortar, the plaintiff should have rejected it.

At the conclusion of the arguments of counsel, his lordship, in giving judgment, said that the question was whether the plaintiff, by reasonable diligence, could have discovered the defects in the mortar before using it. He came to the conclusion on the evidence that he could not when the mortar was in a wet state before being used, and that the cost of pulling down and rebuilding could properly be recovered from the defendant, and he was also entitled to damages for loss of ground-rent.

Judgment was accordingly entered for the plaintiff for £101, with costs.

(*m*) *Builder*, Feb. 4, 1893, p. 126.(*n*) See the byelaws now in force, *ante*, p. 643.

[IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION.]

[Before Mr. Justice Phillimore.]

(9) APPERLEY v. MARK PATRICK & SON. (a)

*Damage caused by building operations—Fall of party wall—Negligence of builder's foreman—Liability of builder under indemnity clause.*1902.
May 29.

The plaintiff employed the defendants to pull down and rebuild his house. The contract provided that the defendants were to be responsible for loss, damage, or defects, and that they would have to make good the same, this provision applying not only to the building, "but also to the premises adjoining and contiguous." Owing to the negligence of the defendants' foreman in making certain holes near the base of a party wall, the wall fell, and the plaintiff had to rebuild it. *Held*, that he was entitled to recover the cost of rebuilding from the defendants.

This was an action brought by the plaintiff, the owner of No. 45, Great Marlborough Street, to recover from the defendants, a firm of builders, damages lost at £10,000.

Mr. Macaskie, K.C., and Mr. A. M. Bremner appeared for the plaintiff; and Mr. R. B. D. Acland for the defendants.

It appeared that the plaintiff, wishing to have his house pulled down and rebuilt, entered into a contract with the defendants for that purpose on January 10, 1900, by which the defendants agreed to execute the works intended to be done in pulling down and rebuilding the house and premises in question. The contract provided that the defendants were to be responsible for loss, damage, or defects, and that they would have to make good the same, this provision applying not only to the building, "but also to the premises adjoining and contiguous, and also to the property and person." Defendants also contracted to pull down, board, and shore up and clear away the whole of the then present buildings, the old party walls being retained, and were to "effectually shore and uphold all adjoining premises on all sides, consequent on the pulling down, and also to shore, as before, the party walls and the public way and other works, and to be responsible for the same and make good all damage, if any, and also to be responsible for all injury and damage, not only to property but to persons, and make good any work disturbed to roofs, flats, skylights, or other works of adjoining buildings consequent upon the works." Defendants performed the works under the contract, and the plaintiff's case was that they did not effectually shore or uphold the adjoining premises, and did not shore up the party walls, the result of which was that the wall of No. 46, Great Marlborough Street, collapsed and fell down. In consequence of the damage to the adjoining premises, the tenants brought an action against the plaintiff and defendants, and recovered judgment for £4286 and costs, which sum plaintiff had paid. In addition to this, the plaintiff had expended about £2389 in defending that action. He also, after the party wall fell down, had to pay the London County Council £18 for shoring up, and also £36 for architects' fees. In these circumstances plaintiff claimed from the defendants the damages before mentioned.

Defendants by their defence denied that they had been guilty of negligence, and alleged that as they had acted under the orders of the plaintiff's architect in the matter, the architect was guilty of negligence in ordering them to do the work in question. Defendants denied that they were liable to pay to the plaintiff the sum of £4286 he had paid to the tenants of the adjoining property, as they had by agreement with the tenants, at their own cost, made good all loss, damage, and defects to the premises and ways adjoining to the property of

(a) *Builder*, June 7, 1902, p. 357.

1902.

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the tenants. Whilst denying liability, defendants paid into Court £2701, and said that that sum was sufficient to satisfy the plaintiff's claim, except as to the costs. Defendants also counterclaimed against plaintiff for the sum of £200, the balance they alleged to be due to them.

His lordship, in giving judgment, said that the plaintiff claimed as against the defendants the money he had paid to somebody else in respect of the fall of the wall. The defendant, as contractor, had agreed with the plaintiff as building owner to be responsible for any loss, damage, or defects arising from accident, carelessness, or otherwise; also to make good any loss, not only to works, but to premises and ways adjoining. That being so, it appeared to him that there was no question for him to consider beyond that of the contract. He had no doubt that the defendants were responsible to the plaintiff under the contract, and the only other question he had to consider was the measure of damages. He thought that there was negligence on the part of the defendants and negligence which caused the accident. He did not impute any negligence to the defendants personally. Mr. Patrick had given his evidence in a very satisfactory manner, and had evidently intended to do everything that was right in the matter. Nor did he think that there was gross negligence on the part of anybody, but he was of opinion that there was negligence on the part of the defendants' foreman or bricklayer. He thought that the wall fell because of the holes that were made near its base. No doubt the wall was a bad wall, but his belief was that the final cutting of the holes brought the wall down, and he came to the conclusion that the wall fell because of the holes. There would be judgment for the plaintiff for the sum he had paid in respect of the wall, viz. £4286 and the costs, and the costs in the present action. There would be judgment for the defendants on the counterclaim for the £200, with such costs as they were entitled to on that. The £2701 which defendants had paid into Court would be paid out to the plaintiff in part satisfaction of his claim against defendants.

Judgment accordingly.

[IN THE COURT OF APPEAL.]

[Before the Master of the Rolls, and Romer and Mathew, L.JJ.]

(10) GRAHAM v. THE COMMISSIONERS OF WORKS. (p)

1902.
Nov. 6, 7.

Building contract—Architect—Authority of architect—Power to delegate the duty of supervising and rejecting materials—Forfeiture—Waiver of forfeiture—Question for jury.

An architect employed in accordance with the terms of an ordinary building contract, having first ascertained that portions of the timber used were not of the stipulated quality, delegated the duty of particularising what timbers were to be removed to the clerk of the works. *Held*, that he was entitled to do so. *Held*, further, in the circumstances of the case, that the question whether the defendants had waived the right of forfeiture by delay should have been left to the jury. (q).

This case came before the Court of Appeal on the application of the defendants for judgment or new trial on appeal from a judgment of the Lord Chief Justice of England, after trial with a special jury at the Leeds Assizes, on August 6, 1901, awarding the plaintiffs an inquiry as to damages.

The Solicitor-General (Sir Edward Carson, K.C., M.P.), Mr. Tindal Atkinson, K.C., and Mr. Askwith, appeared for the appellants; and Mr. Scott-Fox, K.C., and Mr. Waugh, for the respondents.

The Solicitor-General, in opening the case, said that the defendants appealed

(p) *Builder*, Nov. 15, 1902, p. 456. This case had been before the Court on another point in 1901. See 65 J. P. 677.

(q) As to architect's power to delegate, see p. 88, *ante*.

on the ground of misdirection by the learned Lord Chief Justice. The action was brought by the plaintiffs, a firm of builders at Huddersfield, to recover from the defendants damages upon the grounds that the defendants had wrongfully terminated a certain building contract dated September 11, 1899, and had wrongfully taken possession of certain unfinished work, materials, and plant, the property of the plaintiffs. The contract in question was for the erection of a new local post-office at Stalybridge, in Cheshire. The allegation of the defendants was that they had a right under the circumstances which had arisen, and under the conditions of the contract, to serve a notice terminating the contract, and to enter into possession with a view to completion of the building and taking possession of the materials and plant. Stated shortly, the question really came to this, viz. whether the defendants' architect, who had certain powers under the contract, had adjudicated on certain defaults of the builders, which adjudication was a condition precedent to the defendants having power to determine the contract and to enter into possession of the works. The whole judgment of the late Lord Chief Justice turned on that one question. He held there was no evidence of adjudication by the architect at all, and if there was no adjudication the defendants had no right to terminate the contract. His lordship thought there was no question to be left to the jury. This Court would say that in one aspect of the case there might be one question which ought to be left to the jury. At an early stage in the case the Lord Chief Justice said he would not allow evidence on the question as to whether there was in fact default by the builders to be left at all to the jury. The learned counsel then referred to the contract which had been entered into between the parties. Clause 3 provided that the work was to be commenced immediately on possession of the site being given over to the builders, and was to be carried on and completed to the satisfaction of the architect by a certain date. Clause 5 provided that every part of the work was to be executed as directed by the specification, and in a sound, workmanlike, and substantial manner, and all the materials used in the construction of the building were to be new and of the best of their respective kinds, except as otherwise provided in the specification. By Clause 10 the architect had power to direct the builders to execute any part or parts of the work before any other part or parts, and he had authority to judge of the manner of execution of any part of the work and the quality of any materials used or intended to be used therein. The architect also had power to order the removal of any part or parts of the work which should appear to him to be of an improper description, and any materials which he should consider to be of an improper size or description, and the builders had to remove all such materials from the site. The Solicitor-General submitted that in both these matters the architect was made by the parties the sole judge. Clause 24 provided that, if the builders should make default in the due performance of their obligations or delay proceeding with the work, the architect should give notice of such default to the builders and specify the same, and on the builders continuing in default for a period of seven days after such notice, then the Commissioners had power, on the written certificate of the architect of the fact of the builders' failure or default to comply with such notice, to determine the contract, and all sums of money due to the builders, and all the builders' goods and chattels on the works, should be forfeited to the Commissioners. It was also provided that the Commissioners had in such case the power to employ other persons to complete the work, and that without prejudice to any claim they might have against the builders for breach of contract. It was under that clause that the Commissioners purported to take possession of the site.

On November 7, 1900, the defendants' architect, Mr. W. T. O'Brien, went in the ordinary course of business to inspect the work as it was going on, at the time the builders were putting in the woodwork of the roof of the post-office. Mr. Beaumont, the clerk of the work, pointed out to the architect certain timber which was lying on the ground, of which certain pieces which had been actually put in the roof formed part. Mr. Beaumont pointed out that the timber was inferior to that specified for. The architect did not go on to the roof to

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Romer and
Mathew, L.JJ.

inspect the joists himself, but being satisfied from what he saw of the timber on the ground, and of what Mr. Beaumont said about it, he instructed this gentleman not to allow the timber to be used. On November 14 he received a report from Mr. Beaumont that, notwithstanding his protest, the builders were still using the timber in the roof. On November 15 the architect wrote to the builders that he was compelled to insist upon their removing from the roof all such timber as was objected to, and that such parts would be pointed out to them by the clerk of the works. He told the builders also that unless this was done within a week, the work under the contract would be stopped. On November 16 Mr. Beaumont wrote to the builders and specified the pieces of timber objected to. He had gone on to the roof and marked with a blue pencil the pieces of timber objected to. One of the plaintiffs' firm then seemed to have come down and seen Mr. Beaumont, and said he would remove the timber in question if that would put an end to the whole of the grievances and complaints. Mr. Beaumont said he had no power to say any such thing, and then the builder said he would do nothing.

On November 24 a gentleman acting for Mr. Oldrieve, who was ill, gave the builders notice that they had made default in not removing the defective timber from the roof, and requiring them to remove same, and replace with sound timber, failing which the Commissioners would proceed as they might be advised. No notice was taken of that, and eventually the defendants terminated the contract, and took possession of the works. The learned counsel said that the Lord Chief Justice, while agreeing that there had been sufficient notice to the plaintiffs, thought the defendants had not brought themselves within Clause 24, because the defendants allowed Mr. Beaumont to mark the individual pieces of timber objected to, and that their architect did not do so. He held there had been no adjudication by the architect at all. The whole question was whether the architect had sufficiently indicated to the builders what was complained of.

Lord Justice Romer: What I suppose the other side will say is that this was not notice by the architect of defects which he had satisfied himself were defects; but notice of defects which his subordinate had decided were defects?

The Solicitor-General said that the contention from the other side seemed to be that in every such case the architect must himself get a ladder and go up on to the roof, or down a manhole into a drain, and specify every particular piece of timber, brick, or pipe he objected to as being defective. His (counsel's) contention was that the architect had the right to say to a competent man, and whom he knew to be competent, "You pick out the pieces of timber, bricks, or pipes you say are defective."

The Master of the Rolls: This matter has often been discussed; I mean the limits of the architect's rights where he is himself *delegatus*, and how far he can delegate to anybody else.

The Solicitor-General: Yes; there are some authorities. I think what they come to is this:—If the architect says, "I am not going there at all; I am not going to look at the timber, and I appoint another man to do that because I am too busy," that would not be enough. But if he is in daily, or the customary, contact with the work, and exercising proper supervision over the work, and leaves the carrying out of certain details to another, he is not delegating his position at all. He is merely having the assistance of persons he is entitled to have.

The learned counsel, in conclusion, submitted that the learned Lord Chief Justice had misdirected himself on the matter, and that the defendants, in all the circumstances, were within their rights in terminating the contract.

Mr. Tindal Atkinson followed on the same side.

Mr. Scott Fox, on behalf of the defendants in support of the judgment in the Court below, contended that inasmuch as the defendants' architect had not himself personally inspected the timber used in the roof which was objected to by the clerk of the works, the defendants had no power to terminate the contract. The contract provided that the architect was to be the judge in such

matters, and he could not delegate such duty to the clerk of the work. The plaintiffs contracted to rely on the discretion and judgment of the architect, and not on the discretion and judgment of anybody else. In the present case the architect relied and acted on the discretion and judgment of the clerk of the works, but that was not sufficient to enable the defendants to give notice determining the contract. The learned counsel next dealt with a cross-appeal by the plaintiffs, which was that if the Court should be of opinion that the defendants had the right to act on the architect's certificate, the defendants had waived their right to terminate the contract by ordering extras after the time they gave plaintiffs notice determining the contract, and had ordered goods to be sent on the site from sub-contractors, for which the plaintiffs were liable to pay. He admitted that a question ought to have been left to the jury whether, even supposing the defendants had the right to give the notice determining the contract, defendants had not waived their right to do so.

The Solicitor General having replied on the whole case, and Mr. Waugh having replied on the plaintiffs' cross-appeal,

The Master of the Rolls, in giving judgment, said this was a case of some difficulty. The first question to be decided was whether the architect had acted in accordance with the terms of the contract so as to justify the defendants determining the contract. If the Court was of opinion that there was a consummated forfeiture, then there arose a second question of whether the defendants had waived their right to exercise that forfeiture. As to the first point, the Lord Chief Justice had held that the architect had not adjudicated on the matter, in that he delegated the duty of the inspection of the timber to the clerk of the works. By the terms of the contract the architect could order the removal of any materials used in the building that appeared to him not up to the specified quality. The plaintiffs' contention was that, that being so, he must himself determine and decide upon what particular timbers were not up to quality. What the architect actually did was to examine the wood on the ground, and finding that it was not of the required quality, he directed the clerk of the works to mark the timbers already put in the roof of the sorting-house to which he objected. Upon that gentleman's report the architect framed his certificate, and the question was whether in these circumstances the architect could be said to have adjudicated on the matter. It was perfectly obvious as a matter of business that one could not expect an architect to go into every detail himself, and his Lordship had no hesitation in holding on the authorities that the architect, having himself first ascertained that the timber being used was not of the stipulated quality, was perfectly entitled to delegate the duty of particularising which of the timbers had to be removed. That being so, the defendants had the right to terminate the contract had they not waived their right of doing so. In his Lordship's opinion, having regard to the time that was allowed to elapse between the commission of the default and the termination of the contract, and to the fact that the architect ordered the plaintiffs to execute certain extras after default, there was a question of waiver on the part of the defendants which ought to have been left to the jury. That being so, unless the parties could come to some agreement, there must be a new trial.

The Lord Justice concurred.

1902.

GRAHAM v.
THE COM-
MISSIONERS
OF WORKS.

The Master of
the Rolls, and
Kilmer and
Mathew, L.JJ.

[IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION.]

[Before Mr. Justice Channell.]

(11) PATMAN & FOTHERINGHAM v. PILDITCH. (r)

1904.
July 16.

Bills of quantities—Words incorporating the bills of quantities into the contract as part of the description of the work to be done—Effect of incorporating the bills of quantities. (s)

This was a claim by the plaintiffs, a firm of builders, against a building owner, who acted as his own architect, for £2708 14s. 7d., balance of an account for money paid, work and labour done, and materials provided in the erection and completion, fit for occupation, of a block of flats, etc., on a site in Southampton Row, pursuant to a contract dated July 13, 1900. The contract provided that the plaintiffs should well and substantially execute and complete, fit for occupation, for the sum of £17,338, the several works required to be done in the erection and completion, fit for occupation, of a block of flats and shops thereunder, on the site of Nos. 120, 122, and 124, Southampton Row, Bloomsbury, in a good, sound, lasting, and workmanlike manner, according to *the plans, invitation to tender, specification, and bills of quantities* signed by the plaintiffs, and within the time specified in and subject to the conditions annexed to the contract. The plans, specification, invitation to tender, and conditions had been prepared by the defendant, who was both architect and employer. The plaintiffs also undertook to work according to such other detailed drawings as might thereafter from time to time be prepared by the architect. The contract also provided that the plaintiffs and the defendant should observe and comply fully with the conditions thereto annexed, and that the defendant would pay the sum of £17,338, or such other sum as might become payable under the contract, in accordance with the said conditions, which should be read and construed as part of the contract.

The statement of claim endorsed upon the writ alleged that the amount due to the plaintiffs under the contract, and in respect of certain extras, etc., was £18,458. The plaintiffs claimed the right to add to the contract price, (a) the cost of certain variations, for which prices had been settled; (b) the cost of certain variations, for which no price had been settled; (c) a sum in respect of errors in a bill of deductions; (d) a sum in respect of errors in the original bill of quantities, less the value of items which would disappear owing to variations; (e) the fees of a quantity surveyor for taking out quantities, measuring variations, and making up accounts (2 per cent. on total amount). Giving credit for certain omissions, and for £15,750 paid on account, the total amount claimed was £2708 14s. 7d. The defendant, by his defence, alleged (a) that the plaintiffs had been guilty of delay, and (b) that throughout the period during which the works were executed the defendant acted as his own architect, and from time to time gave the plaintiffs orders in writing upon his order forms, and that no variations, deviations, or extra works were ever ordered by him or with his authority without his giving such orders in writing. He denied that there were errors in the bill of deductions or in the original bill of quantities, or that, if there were any such errors, he was under any liability in respect thereof. He also denied that he ever agreed to pay, or that he was liable to pay, the fees of the quantity surveyor employed by the plaintiffs. He also counter-claimed for certain sums alleged to have been over-paid by him to the plaintiffs. By their reply, the plaintiffs alleged that it was owing to the defendant's negligence or misconduct in preparing bills of quantities that it became necessary for them to

(r) This report has been compiled from the pleadings and a shorthand note of the judgment, kindly lent to the editors by Messrs. Ford Lloyd & Co., solicitors for the plaintiffs. See also *Builder*, July 16, 1904, p. 73.

(s) From an epitome of the decision in this case, see p. 9, *ante*.

employ a quantity surveyor. In their defence to the counter claim, they alleged that the bill of deductions and bills of quantities were improperly, unfairly, and negligently prepared, and were misleading to the plaintiffs, and the defendant throughout the performance of the contract acted as his own architect, and in such a manner as to render any decisions left to him by the terms of the contract unfair to the plaintiffs.

The question for the Court to determine was whether, upon the true construction of the contract, the bills of quantities formed part of the contract.

Mr. A. T. Lawrence, K.C., and Mr. Poyser, appeared for the plaintiffs; Mr. Duke, K.C., and Mr. Beddall for the defendant.

Mr. Justice Channell delivered the following judgment: This matter is one of considerable doubt upon the construction of this contract. The bills of quantities are incorporated in an unusual manner. I have been referred to a statement of the Master of the Rolls, in which he says, dealing, I think, with the ordinary case of a bill of quantities, that it is well understood, and that it had been settled in more than one case, that this document, the bill of quantities, where it was embraced in, and made part of, one of the other documents, whether by being in the specification or by being scheduled to the contract, or as a separate document altogether, was not, and was not intended to be, a representation to be acted on in the sense of being a warranty. Now, as regards all the instances which the Master of the Rolls gives, except as to being introduced into the contract, that, of course, is all perfectly clear. He speaks, in general words, of it being introduced by, amongst other things, a schedule to the contract. He does not say in the contract itself; and if it is introduced into the contract itself, it seems to be perfectly obvious that the operation of it depends upon the mode in which it happens to be introduced into the contract. Because it is perfectly possible, although a thing is a bill of quantities, and has been prepared as and for the ordinary use of a bill of quantities, if the parties like to incorporate it into their contract as a description of what the work is that is contracted to be done, they can do so. Therefore, if you find it in the contract, you have got to construe the contract so, and say what it means. I suppose every one understands by this time what a bill of quantities is, and how it comes into operation. It is prepared, as a rule, by some independent person who, under a special arrangement that is made in such matters, takes the place of the builder's clerk. If there were no such thing as making out a bill of quantities when the plans were submitted to tender, each builder would have to do it himself, and would have to pay his own clerk for doing it. For general convenience, however, it is done in a different way, and that man whose services, rendered before the builder knows anything about it, are adopted by the builder in each particular case, stands very much in the same position—in fact, in quite the same position as if he had been originally employed by the builder to take out the quantities for him himself, although he has been employed by somebody totally different. In this particular case, the gentleman who entered into the contract for the building to be built for him, is himself an architect. He was the architect in regard to this building, and the printed form of contract is therefore altered by substituting the words "architect and employer" for "architect engaged by the employer." In some respects the contract is anomalous. It does happen that he had the bills of quantities prepared by his own clerk. In effect, therefore, he prepared them himself. I think it applies, for the purpose, to totally different characters. He is a contracting party. Also, he is the quantity surveyor. As a contracting party he has certain liabilities, and as quantity surveyor he would take other liabilities. If, in his capacity of quantity surveyor, he has been guilty of negligence, he will be liable, of course, for that negligence. (i) There is no difficulty about that cause of action. The real difficulty is the main cause of action, if not the only cause of action, which is set up in these pleadings, and that is the cause of action against him as contracting party. As to that, it is necessary to see what

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(i) See *Bolt v. Thomas* (Times, August 10, 1880, p. 11), where an architect was held liable to the builder who had employed and paid him for taking out the quantities. (F.A.)

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is the true meaning of this contract so far as it relates to work which is to be done for the £17,338. As a general rule, of course, contract work is described in plans and a specification. The bill of quantities is the estimate made by some outside person as to the quantity of work which those plans and specifications show, and, assuming that it is properly done, the works described in the bills of quantities and the works described in the plans and specification would be identical. In this case the suggestion is, and, for the purposes of argument only, it has been admitted, that they are not identical, and that there were very large discrepancies between the bills of quantities, which were, in point of fact, made out, and what ought to have been the true bills of quantities upon the contract plan.

Now, those being the facts, the contract is entered into in this form: "The contractor will substantially complete, etc., for the sum of £17,338, the several works required to be done, in the erection of a block of flats on a site."

If it had ended there it would have been, of course, absolutely and entirely indefinite. The next sentence is, "in a good, sound, lasting, and workmanlike manner." That is the manner in which the work is to be done, and we have not yet got the particular description turning the indefinite block of flats into some definite amount of contract work. Then it goes on: "According to the plans, invitation to tender to specification, and bills of quantities signed by the contractors." The words "signed by the contractors" grammatically, and, in fact, in this case no doubt apply to all the things, although I do not suppose the invitation was signed by the contractor. It may have been. But the plans were signed by the contractors. The specification was signed by the contractors. The original bill of quantities was not signed by the contractors; but the priced bill which he gave in was. I think, therefore, that those bills of quantities signed by the contractors mean the priced bills of quantities.

Following those words, "according to the plans, invitation to tender to specification, and bills of quantities," that is, following upon an indefinite description of the work to be done, it then becomes necessary to find the description of the work that is to be done, the thing that turns a block of flats indefinite into some definite block of flats; and this must be found, somewhere or another, in these words that follow, "the plans, invitation to tender, specification, and bills of quantities." But it is also necessary to find in these four documents the mode of doing the work, because that has come just before in "a sound, lasting, and workmanlike manner," according to these documents. These four documents are therefore expected to do two things: (1) define the work that is to be done and turn the indefinite "a block of flats" into the definite block of flats; and (2) set forth the instructions as to the mode in which the work is to be done. Is it to be said that some are to be looked at for some matters, and some for others, or are all of them to be looked at for both purposes? I think if there is anything material in any one of them for either of the two purposes, it must be looked at for that purpose as well as for the other. So far as these documents have got anything material to both purposes, they must be looked at for both purposes to define the work, and also to show the mode in which it is to be done. For which purposes are the bills of quantities to be looked at? The bill of quantities is the document which says, when you have got it incorporated like this, what the quantity of the work is to be. Mr. Lawrence's argument is that I must deal with it in the same way as in any contract, or anything else we have to construe; that is to say, I must deal with the specific as overriding the general words and governing them, just as even, I think, without a clause to that effect in a contract, one is bound to hold that figured dimensions override some dimensions arrived at by taking the scale. I think that there is a great doubt about the way in which one should look at it, but on the whole, I cannot help feeling that Mr. Lawrence is right in saying that, if it was merely desired to introduce bills of quantities for the purpose of showing the way in which the extras were to be priced, that has already been sufficiently done by Clause 7. (u) I think it was unnecessary to introduce

(u) Clause 7 of the contract provided, in effect, that all additions, omissions, or variations

the words "bills of quantities" in the way in which this was done, unless it was intended to make that, like the other documents with which it is coupled, a part of what the contract to define what the work was, and for the purpose of turning the indefinite block of flats into some definite amount of work. This is not the first time I have had experience of these building contracts, and I have always taken the view that, when the bills of quantities were introduced and I have seen one or two cases of the kind) in this particular way, and made part of the contract, it is for the express purpose of varying the usual effect of these bills of quantities, making them part of the contract instead of a mere estimate of what that contract is. My view, therefore, not arrived at by any means without doubt, is that here, so far as the bills of quantities and the plans can be put together and looked at as a thing in accordance generally with the plans, and with the quantity of work shown in the quantities, so far as that thing is possible (and I take it that it is in these matters), then the quantities provide the amount of the work, and, if in the course of doing the work the contractor is directed to exceed that amount of work for the purpose of making it accord with what it is desired to have in regard to the building, I think that then that is all extra, and not, of course, to the further things in the contract as to the mode in which it is to be done, and so on.

I think, therefore, on the whole, that the bill of quantities is incorporated into this contract as a part of the description of the contract work, and that, therefore, apart from any question of negligence which there might possibly be, and which would have to be dealt with in a different shape, as I have said before, if the facts for that purpose only are admitted, the plaintiff is necessarily entitled to something beyond what he has been allowed.

I say, therefore, that my judgment, subject, of course, to the reference, will be on the construction of the contract for the plaintiff. My view is that the whole of the quantities are introduced into this contract as part of the description of the contract work, and that, therefore, as he is required, in order to complete the work, to do more work than is in the quantities, he is entitled to have that as an extra. That is nearly the same thing.

Mr. Duke: The plaintiffs are entitled to have the work comprised in the plans and specifications, but not comprised in the bill of quantities.

Mr. Justice Channell: I think that must be so. But about the word "comprised." My view is that the plans do not go to quantity. I should not like myself to deal with all cases in a general form like that. I am not by any means sure that there might not be cases of accidental omissions from the quantities, an omission, for instance, of a thing that might not be clearly specified in the plans and might not be part of the contract work, like the flooring in the case you cited. (x) I do not mean to put it like that. I mean to say that where there is a quantity specified, such, for instance, as a quantity of brickwork, that is the quantity to be done; and if in order to do a thing which makes a building in accordance with the scale of the plan, you desire to use more than you are to be paid for otherwise, that will be regarded as an extra. I should have to deal specifically with cases of things which everybody must understand are to be done, but which happens to be omitted in the quantities. The case of *Williams v. Fitzmaurice* (y) covers that.

Mr. Duke: It is now matter, and there would probably be a discussion in the Court of Appeal about it. Would your Lordship say execution and reserve the costs of this hearing until the action is disposed of?

Mr. Justice Channell: Certainly, and the Court of Appeal will make any necessary declaration if I am wrong. I will read you my note of your agreement yesterday! "Evidence being given about the deficiency in the bill of quantities, it is agreed that, if necessary, then," that is, the discrepancies, "are to be gone

made in carrying out the works, for which a price might not have been previously agreed upon, were to be measured and valued and certified by the architect, and added to or deducted from the amount of the contract as the case might be, according to the prices in the detailed bills of quantities upon which the tender was based.

(x) See *Williams v. Fitzmaurice*, 3 H. & N. 844, *Ex li.*

(y) 3 H. & N. 844.

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into by an arbitrator, and the question of the construction of the contract is to be argued first on the assumption, not admitted except for the purposes of argument, that discrepancies to that amount, or to some other amount, exist." That is the basis on which you are to go. Upon the construction of the contract I decide that the bills of quantities are part of the description of the contract work, and that the whole of the documents must be construed together.

[IN THE COURT OF APPEAL.]

[Before Vaughan Williams, Stirling, and Moulton, L.JJ.]

(12) GEARY, WALKER & CO., LTD. v. LAWRENCE & SON. (2)

1906.
May 11.

Sub-contract—Sub-contract contained in a letter having references to provisions of head contract—Construction.

This was an action brought by the plaintiffs, wood flooring contractors, of 11, Queen Victoria Street, E.C., against the defendants, Messrs. Walter Lawrence & Son, of Waltham Cross, a firm of builders, to recover a balance alleged to be due under a building contract. It originally came before Mr. Justice Kennedy, sitting without a jury in the King's Bench Division. He gave judgment for the plaintiffs. The defendants appealed.

Mr. G. A. Scott appeared for the appellants, and Mr. J. Eldon Bankes, K.C., and Mr. Lewis Thomas for the respondents.

Mr. Scott, in opening the case, said the question the learned judge had to decide was, whether on May 12, 1904, the sub-contractors were entitled to sue the main contractors for the balance of their account. On that date the plaintiffs issued their writ claiming £106 2s. The case for the defendants was that the plaintiffs had commenced their action prematurely. Defendants said that they were entitled to hold the balance until all the work was approved by the architect.

[Lord Justice Moulton: The point is whether the action was ripe at the date of issuing the writ.]

Mr. Scott said that that was so. Although the amount sued for was comparatively small, the case raised a question of great importance with reference to building contracts. The defendants on January 23, 1902, entered into a contract with the Edmonton Urban District Council to erect swimming baths, a council chamber, council offices, etc., the contract price working out at something between £30,000 and £40,000. Defendants agreed with the plaintiffs to do the wood flooring, etc., for £1058. Of this £952 had been paid, and the action was brought to recover the balance. The contract between the plaintiffs and the defendants was dated March 11, 1903. Under that contract the plaintiffs, the sub-contractors, agreed that the work should be done and the materials supplied to the satisfaction of the architect, Mr. W. G. Scott, and that they would maintain it for a certain period. Defendants further alleged that under their own contract with the Edmonton authority they only received 80 per cent. of the amount due for the work done until a certain period, and that the plaintiffs were subject to the same terms as to money being retained as security for the work being properly done. Mr. Justice Kennedy held that the retention clause did not apply to the plaintiffs, and gave judgment for them for £88 19s. It was submitted on behalf of the appellants that at the time the plaintiffs issued their writ the money was not due under the contract, and that therefore the decision of Mr. Justice Kennedy was wrong. The material clauses in the main contract between the Edmonton authority and the defendants were

(2) Taken from the *Builder*, May 19, 1906, p. 564.

Clause 29 which was in the same terms as Clause 20 of the form of agreement recommended by the Royal Institute)(a) and Clause 30, which ran—

"The contractor shall be entitled under the certificates to be issued by the architect to the contractor, and within fourteen days of the date of each certificate, to payment by the employer from time to time by instalments when in the opinion of the architect work to the value of £500 (or less at the reasonable discretion of the architect) has been executed in accordance with the contract, at the rate of 80 per cent. of the value of work so executed in the building until the balance retained in hand amounts to the sum of £2000, after which time the instalments shall be up to the full value of the work subsequently executed. The contractor shall be entitled under the certificate to be issued by the architect to receive payment of £1500, being a part of the said sum of £2000, when the works are practically completed, and in like manner to payment of a further sum of £300 within a further period of three months or as soon after the expiration of such period of three months as the works shall have been finally completed and in like manner to payment of the balance of £200 within a period of twelve months from final completion and after all defects made good according to the true intent and meaning hereof. The architect shall issue his certificates in accordance with this clause. No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement. The contractor when applying for a certificate shall, if required, as far as practicable, furnish to the architect an approximate statement of the work executed, based on the original estimate."

The contract of March 16, 1903, was as follows:—"We, the undersigned, Messrs. Henry, Walker & Co., Ltd., of 11, Queen Victoria Street, E.C., hereby agree and undertake to carry out all mosaic and other work at the Town Hall, Bath, and Council Chamber Buildings, Lower Edmonton, for Walter Lawrence & Son, of Canal Works, Waltham Cross, and to the architect's entire satisfaction, orders for which have been or will be sent us from time to time by the said Walter Lawrence & Son, the work to be carried out as and when required by them; we further agree that no claim shall be made by us for any extras of any kind, unless the same have been ordered in writing by the said Walter Lawrence & Son, and that we will maintain in proper working order the whole of the work executed by us until the expiration of the time for which the said Walter Lawrence & Son are bound by their employers under their contract dated January 23, 1902, and we will also indemnify them against any loss upon any question which may arise under Clause 20 of the conditions of the contract above mentioned, and the terms of payment for the work in question shall be exactly the same as those set forth in Clause 30 of the said conditions of contract above referred to; and in fact we are willing and hereby agree to be bound in every respect by the whole of the terms, clauses, and conditions as set forth in the contract dated January 23, 1902."

Mr. Eldon Banks and Mr. Lewis Thomas having supported the judgment of Mr. Justice Kennedy,

Lord Justice Vaughan Williams, in giving judgment, said that, having regard to the documentary evidence, the Court must assume that the parties knew the course of business qualified to the extent that Mr. Walker in his evidence stated that he did not know the details of the retention scheme in the original contract between the defendants and the Edmonton authority. With that exception they must assume that both parties knew the course of business and what certificates were being given. It seemed to his lordship that the intervening certificates of the architect did not on the face of them say that any particular work was included in the amount certified for, and in these circumstances the onus lay on the plaintiff to show that the certificates did in fact include the work in question. He thought the proper way to construe the document of March 16, 1903, was to read the contract by applying *mutatis mutandis* Clauses 20 and 30 of the main contract between the contractors and the local authority. He thought the plaintiffs had failed to make out that they were entitled at the time they brought the action to succeed in recovering the balance of their account,

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(a) See F. VIII., Cl. 20, *ante*, p. 385.

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and on these grounds he was of opinion that the judgment of Mr. Justice Kennedy should be set aside.

Lord Justice Stirling said he always regretted to find himself differing from Mr. Justice Kennedy, but he came to the conclusion that his judgment could not be upheld. He agreed that *prima facie* the covering letter of March 16, 1903, ought to be treated as introducing a new term into the contract which was accepted by the defendants by their making no objection; but as neither side desired in any way to rely upon the letter, it was far better, he thought, that their judgment should not rest upon that, and he was quite content to proceed upon the formal contract of March 16, 1903. The question turned upon these words: "And the terms of payment for the work in question shall be exactly the same as those set forth in Clause 30 of the said conditions of contract above mentioned." It has been said that it was impossible to give effect to that stipulation. His lordship was not persuaded of that. What were the terms of payment as they appeared from Clause 30 of the contract? First, that the contractor, meaning there the main contractor, was to be entitled under the certificates to be issued by the architect to him to payment by the employer by instalments at the rate of 80 per cent. of the value of work so executed in the building until the balance retained in hand amounted to £2000, after which time the instalments were to be up to the full value of the work subsequently executed. The contract of which Clause 30 was a part was a contract to erect buildings at a cost of, speaking in round figures, about £28,000, and £2000 was to be the fund which was to be kept in hand by the employer by means of deductions from the amounts which appeared by the architect's certificates to be due. The sub-contract with which they had to deal was in comparison a very small contract. The whole sum which was to be received in payment was somewhere about £1000, and obviously therefore literally the £2000 (if that was read as being part of the contract) would make it impossible to work; but what the document of March 16, 1903, said was not that Clause 30 was to be read in its very language into that document, but that the terms of payment for the work were to be exactly the same as in that document. One of the terms of Clause 30 was that a sum of £2000 of £28,000 was to be retained. It seemed to his lordship that the exactly similar term would be that a like proportion of the £1000 should be kept in hand and that the sub-contractor should from time to time receive from the main contractor 80 per cent. up to the time when the sum bearing the same proportion as the £2000 bore to the £28,000 had been accumulated, and after the full payment. Then that being the term as to the payment of the instalments, the clause contained a provision as to how the £2000 which was to be kept in hand was to be dealt with. It provided that the contractor should be entitled, under the certificate to be issued by the architect, to receive a payment of £1500, being a part of the £2000 when the works were practically completed, and in like manner to payments of a further sum of £300 within a further period of three months or as soon after the expiration of such period of three months as the works had been finally completed, and in like manner to payment of the balance of £200, within the period of twelve months from final completion and all defects were made good according to the true intent and meaning thereof. Having got over the difficulty as to the £2000, it seemed to him that there was no difficulty in saying that the stipulation that the terms for the payment of the retention money should be dealt with in a similar manner; that the fund kept in hand should be divided into three parts, one of which bore the same proportion to the total retention money as the £1500 did to the £2000; then the second part which would be dealt with would be a sum which bore the same proportion to the total amount of the retention money under the sub-contract as £300 to the £2000, and then there would be the ultimate balance ascertained. So far it seemed to him that effect could be given to the contract, but then there followed the stipulation which had created a considerable amount of difficulty to him, because there was a positive stipulation that the architect would issue his certificate in accordance with that clause. Then, prior to the contract of March 16, 1903, the architect

had positively declined to issue certificates to any sub-contractor under the main contract; and it did seem to his lordship a difficulty which had to be met as to what the effect of that was on the stipulation. He thought that both parties must have been aware of the course of business. In fact Mr. Walker, who was called, really admitted that, although he did not admit that he knew the details as to the distribution of the retention money. It seemed to him that the proper way to read the clause in that case was to treat them as being satisfied to deal with the certificates in accordance with which payments were to be made as long as those which were to be issued by the architect to the main contractor, and not to treat this clause as introducing a separate bargain for separate certificates between the main contractor and the sub-contractor. That being so, if that was the true construction of the clause, it seemed to him that the plaintiffs failed to make out that they were entitled at the time when they brought the action to succeed in recovering the balance. That appeared to his lordship to be borne out by the whole course of dealing between the parties subsequently. The sub-contractor never made any objection to the deductions in fact being made at the time. They did not amount, it was true, excepting in the first place, to 20 per cent., but 10 per cent. was always retained. Both parties were perfectly satisfied with that, and, of course, it was competent for the main contractor to waive his strict rights. No difficulty arose until the final application was made for the payment of the balance, the delay in which was caused, as it seemed to him, by the delay on the part of the architect in giving to the main contractor a certificate which entitled him to any portion of the £2000 which was outstanding. He thought it was plain, therefore, that the plaintiffs failed to make out their case, and that they were not entitled to payment of the balance at the time they brought the action. On these grounds he was of opinion that the judgment of Mr. Justice Kennedy should be reversed.

Lord Justice Moulton gave judgment to the same effect, and the appeal was accordingly allowed, with costs, both in that Court and in the Court below.

1896.

GOARY,
WALKER &
CO., LTD. v.
LAWRENCE
& SON.

Vaughan
Williams,
Stirling, and
Moulton, L.JJ.

[IN THE HIGH COURT OF JUSTICE.]

[Before the Master of the Rolls, A. L. Smith and Chitty, L.JJ., in the Court of Appeal, and Billel, J., in the King's Bench Division.]

(13) DREW BEAR AND OTHERS v. ST. PANCRAS GUARDIANS. (b)

1897.
May 17.

Building contract—Delay in giving contractor possession of site—Interference with contractor hindering his progress—Breach of contract entitling contractor to damages—But not rescission of contract entitling him to be paid on a quantum meruit—Measure and value.

The plaintiffs in this case were the trustees of the creditors of Mr. Wm. Brooks, a builder and contractor of Folkestone. They sued the guardians of the poor of St. Pancras, and their architects, Messrs. A. & C. Harston, for a balance of £24,226, or, alternatively, £24,262, all due to be due on a contract for the completion of the St. Pancras workhouse. The plaintiffs' case was that the guardians, having resolved to reconstruct the workhouse in King's Road, appointed Messrs. Harston as their architects. The contract for the work was at first taken by Messrs. Kirk & Randall, of Woolwich, but disputes arose, and in 1892 that firm requested to be relieved of further work under the contract. Fresh tenders were then invited for the unfinished work, and that of Brooks was accepted for £50,861. The work was to occupy fifteen months from May, 1892, but delays arose, and in November, 1894, the work was stopped. Messrs. Drew Bear, Perks & Co., of Queen Victoria Street, who

(b) *BUILDER*, May 22, 1897. This report has been compiled from the lengthy reports which appeared in the *BUILDER* from time to time. The junior counsel for the defendants has been good enough to peruse this report, and to say that it is accurate.

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supplied the ironwork, Mr. H. Tolputt, of Folkestone, who supplied timber, and Mr. J. Brown, of Cannon Street, who supplied bricks, sued on behalf of creditors for the balance alleged to be due to Mr. Brooks. The net cost of the work executed was stated to be on the first claim £65,479, plus 10 per cent. profit, £6547, making £72,076, of which £47,800 had been received under the architects' certificates, leaving a balance of £24,226. In the alternative claim the net cost of the work executed was estimated at £65,479, as before, but the 10 per cent. profit was reckoned on the contract price of £50,861, which, with other amounts claimed, brought the alternative claim to £24,262. The plaintiffs alleged that Brooks was hindered from continuing and completing the contract by the action of Mr. George Poole, the clerk of the works, who interfered without sufficient cause and capriciously and vexatiously condemned materials. It was also alleged that the architects were seldom on the works, and that the interference of the clerk of the works caused needlessly a net loss to Brooks of £2526, in addition to £193, the value of the materials left by Messrs. Kirk & Randall, and not permitted to be used.

The defendants by their defence generally denied the charges against the clerk of the works, and alleged that Brooks had not carried out his undertaking to complete the work left unfinished by Kirk & Randall. The guardians further relied on the Public Authorities' Protection Act, 1893, as being a defence, inasmuch as the matters referred to in the action occurred more than six months before the action was brought. Messrs. Harston, the other defendants, pleaded that they were not liable, and said that they had received no complaints from Poole with respect to the manner in which the works were being carried out by Brooks. After a protracted hearing, (c)

The learned Referee decided (d) that, inasmuch as the plaintiffs had failed to make out that Messrs. Harston had been guilty of fraud, dishonesty, or collusion, those gentlemen were entitled to judgment as against the plaintiffs, with costs. (e) He, however, (f) decided that the contract entered into between the plaintiffs and the guardians, owing to the special circumstances of the case, had been set aside, and that the plaintiffs were entitled to *quantum meruit*, or, in the alternative, to substantial damages, to be ascertained at some future time, and he therefore gave judgment for the plaintiffs as against the guardians, with costs. The guardians appealed from this decision to the Divisional Court (Grantham and Wright, JJ.) on the ground that the judgment and the findings upon which it was based were erroneous in fact and in law, and that there was no evidence, or any sufficient evidence, to justify the learned Referee in finding either that the plaintiffs' contract with the guardians was set aside, or that the plaintiffs were entitled to substantial or any damages, or to any damages or allowances not duly provided for in the contract.

The Divisional Court decided (g) that the case of *Bush v. The Trustees of the Port and Town of Whitehaven*, (h) by which the Official Referee had felt bound, did not apply to the case, and that, although the contractor might be entitled to damages for delay in giving him possession of the site, there was no ground for claiming on a *quantum meruit*. Upon these grounds, the Court directed that the judgment against the guardians must be set aside, and that there should be a new trial.

The plaintiffs appealed from this decision to the Court of Appeal, (i) where the decision of the Divisional Court was reversed, and it was held that the only damages in respect of which the builder was entitled were such damages as he could prove to be the result of delay in giving possession and for interference by

(c) See the *Builder*, Nov. 21, 28, Dec. 5, 23, 1897; Jan. 30, March 6, 13.

(d) See his judgment set out in the *Builder*, March 20, 1897, p. 281.

(e) Messrs. Harston were represented throughout the previous proceedings by Mr. McIntyre and Mr. R. W. Turner.

(f) Following *Bush v. The Trustees, etc., of Whitehaven*, 52 J. P. 392.

(g) On April 13, 1897. See the judgments set out in the *Builder*, April 17, 1897.

(h) 52 J. P. 392, noted *ante*, p. 37.

(i) Lord Esher, M.R., A. L. Smith and Chitty, L.JJ., May 18, 1897.

other contractors. The Court also held that the case of *Bush v. Whitehead Trustees* had no application. *k*

The Master of the Rolls said the respondents must pay the costs in the Court below.

The appeal was accordingly allowed, with the costs as stated.

The case came before Mr. Justice Ridley on January 11, 1898, *l* for the assessment of damages.

Mr. R. M. Bray, Q.C., and Mr. A. A. Hudson, again appeared for the plaintiffs; Mr. English Harrison, Q.C., and Mr. Moyses for the defendants.

Mr. Bray, in the course of his opening remarks, explained the different heads under which damages were claimed. They may be summarised as follows:

(1) In consequence of the contractor not being able to have full and complete possession of the site, and not being allowed to continue in possession thereof, and the failure to get possession of Block A within six months from the date of the contract, the labour exceeded what should have been its proper cost by at least 25 to 30 per cent., being an excess of from 10 to 12½ per cent., exclusive of any rise in the price of labour, or any excess of price paid for materials from the same cause, say 12½ per cent. The plaintiffs reckoned the labour at £24,631, the defendants' experts, however, putting it at about £26,000, but for the plaintiffs' purposes of claim the former sum was assumed, and the item of damage under this particular head worked out at £6357.

(2) £1210 was claimed for the increased price of labour paid to men from and after September 1, 1893, when there was a general rise in wages of a ½d. an hour, plus £121, the 10 per cent. profit which a contractor looked to obtain.

(3) £1000 was claimed as loss sustained by the contractor in making good work injured by sub-contractors and for interference by sub-contractors.

(4) £1555, plus £155, 10 per cent. profit, was claimed for increased price in materials from September 1, 1893, occasioned by the general rise in prices.

(5) £3814 was claimed as establishment charges, increased price of plant, and cost of supervision by 7½ per cent. on the contract.

(6) £1250 was claimed as 1½ years' pay, at the rate of £1000 a year, by reason of the contractor being obliged to give his attention to the undertaking in question for eighteen months longer, owing to delay, than was originally estimated and allowed.

(7) £1250 was claimed on the ground that the contractor had to employ additional capital over a much longer period, which involved increased interest on considerable sums of money remaining idle.

(8) The last claim was one for £160, being 10 per cent. loss of profit on the portion of contract for the chaplain's room, etc., which had been estimated to cost £1600.

These items amounted in the aggregate to £16,872.

A large body of evidence having been called,

Mr. Justice Ridley, in giving judgment, (*m*) said the case was one in which he had to assess the damages to which he might think the plaintiffs entitled according to the judgment of the Court of Appeal. As he understood it, the judgment of the Court of Appeal laid down that the plaintiffs were entitled to damages by reason of the contractor not having been allowed to get possession of the site in question, but that they were not entitled to anything in respect to the acts of the architects; therefore it was not a case in which it could be said that the whole of the contract was at an end, and the plaintiffs were entitled to *quantum meruit*, but the amount of damages they were entitled to must be ascertained in respect of such injuries as resulted to the contractor in not having possession of the site given to him by the guardians. The evidence which had been called before him (his Lordship) on the different heads of damage was of a general character, the witnesses examined

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(1) 52 J. P. 592.

(l) See *Builder*, Jan. 15, 1898.

(m) February 10, 1898.

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before him speaking in their experience as surveyors and builders, and giving their opinion as to what percentage a builder would find his cost increased if he did not get possession of the site. That, he thought, appealed to any one's sense. If a contractor had four or five blocks of buildings to be erected, anybody could see in a moment it was of the greatest consequence that the whole site should be clear, so that the builder could map out his work and get it pushed forward, so that each part helped the other. If the contractor was obliged to build one portion at a time the work became dislocated, and the more buildings he had to put up the worse it was. That was the nature of the present case as it seemed to his lordship. It was, indeed, some time before he personally arrived at the conclusion that it was of so much importance in the case. No doubt interference by the architect did cause delay to some extent, but he thought that the real cause of the mischief which upset the calculations of the contractor, and the expectation of the guardians as to the completion of the work, was mainly due to the fact that possession was not given of the site. That was the way the contract was broken. On the other hand, it must not be forgotten that on the previous occasion it was the plaintiffs who contended, for the most part during the inquiry, that the architect was the person who had prevented the job being carried out, and certainly he did interfere far more than usual in respect to materials brought on the job and to work done on the job. In the second inquiry, as to the damages, the case was reversed because the plaintiffs, who formerly contended that by reason of that interference the job was prevented from being carried out, said that the real cause of the injury was not getting possession of the site. The truth of it was, that although there was some delay caused through the interference of the architect, one's sense told one that the real cause of the delay was not getting possession of the site. It was very unfortunate that this was not done.

It was now necessary to deal with the different heads of damage put forward. He did not mean to go through the whole history of the case again. He had considered the matter as well as he was able on the materials before him. The first head of damage claimed was in respect to the increased cost of the labour by reason of the delay in getting possession of the site. The witnesses called by the plaintiffs had calculated this at the large sum of £6357. That was established by a strong body of evidence as the ratio or proportion which, in the trade, would be attributed to the failure of getting possession of the site. On the other side there was no evidence whatever of any account. There was no contradiction of it, and nobody called or put forward to say it was not so. The position the defendants took was, that it was not right, according to the judgment of the Court of Appeal, that this should be taken into consideration, but he (his Lordship) thought it was. He thought that, dealing with such a case as the present, he ought to be guided by the opinion of those who understood the trade. He thought it was within the decision of the Court of Appeal that he should assess the damages to the best of his ability on the materials put before him. The percentage given by Mr. Chappell and other witnesses was not contradicted. He did not mean to say he was prepared to accept it to its full extent. He did not think that the interference upon the roads by the traffic of the guardians was made out by the plaintiffs. What he had been able to arrive at on this head was, that in place of the £6357 claimed, the plaintiffs were entitled to £4000.

Then there was the claim for increased price of labour, from and after September 1, 1893. That he had included in the sum of £4000, and he added nothing for that. In the same way as to the profit of 10 per cent., that also was included in the sum of £4000.

As to the claim from interference by sub-contractors, he thought, looking at the evidence given, it was exaggerated, and the sum of £250 was as much as the plaintiffs were entitled to in respect to that matter.

Then on the claim as to the increased price of materials from September, 1893, although somewhat in dispute, he thought, upon the whole, that the prices of materials were raised a good deal then. He could not, however, put the loss

on that head as high as the plaintiffs had done. He thought they ought to have £500 for that.

As to the claim for establishment charges, etc., he allowed £1250.

The charges as to loss of profit and failure to get possession of the capital outstanding he put together and allowed £1000 upon those heads of claim.

The total of all these sums was £7000.

Mr. Bray: Your Lordship will give us judgment for this amount with costs?

His Lordship: Yes, I think the damages ought to be assessed at £7000.

Mr. Bray: The amount paid into Court by the defendants was £2500, so, therefore, I am entitled to costs.

His Lordship: I think you are entitled to the costs of this hearing. The Court of Appeal has dealt with the other costs.

Mr. English Harrison: Then, technically, judgment will be for £1500 in addition to the sum paid into Court.

His Lordship: Yes. (n)

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(n) A stay of execution pending an appeal was granted, but there was no appeal.

GLOSSARY OF ARCHITECTURAL AND BUILDING TERMS USED IN THE BUILDING ACTS, BUILDING WORK, BUILDING LEASES, AND IN CONTRACTS, ETC. (a)

ABACUS. The upper member of a capital, projecting over it and generally moulded, or a plain square slab, as in the Grecian Doric style.

ABUT. To touch or join by its end without framing. To border upon an adjacent premises.

ABUTMENT. The solid support from which an arch springs, or whereby a structure is upheld.

ABUTTAL. A piece of ground which bounds on one side the lot or plot under consideration.

ACANTHUS. Foliage used in classic enrichments. Chiefly in the leafage of a Corinthian capital.

AGGREGATE. Any hard material like ballast, or broken brick, or breeze, employed to mix with lime or cement to make concrete.

AIR-BRICK. A perforated block or box, following the dimensions or proportions of a brick to build in easily, and placed in the wall to allow of the inlet through it of air, and so constituting an easement of considerable value and importance either as a vent or intake.

AIR-DRAIN. An external covered or dry area to keep the damp away from the lower part of a building, and also as a fresh-air inlet to fireplaces, furnaces, or radiators, and the like.

ALCOVE. A recess or curtained space for bed, or otherwise opening out of a larger apartment.

AMBRY. A storage place or closet, food place or pantry, and as such a cupboard in a wall.

ANGLE-BEAD. } A bead to form an arrie, employed to stop plastering or boxed
ANGLE-STAFF. } wooden casings at external angles, as an inexpensive finish.

ANGLE IRON. A rolled iron bar of the section of the letter L.

ANNULET. A small moulding or ring on the column.

ANTE. Pilasters or square piers, forming the termination of walls, or placed against openings to range with columns. In lieu of half or three-quarter columns, square pilasters thus named are sometimes used against walls.

(a) This glossary has been brought up-to-date and amplified by Mr. Maurice B. Adams, F.R.I.B.A., architect, who has kindly undertaken this task at the request of the editors.

- APARTMENT HOUSE.** An American term for a building let out in suites of rooms, usually called "flats" in England.
- APRON.** A strip of lead, or zinc, or roofing material bent down over a flashing to exclude the wet. Ornamental horizontal work below cornice of a verandah.
- ARCHITRAVE.** The lowest member of the entablature. The mouldings round a square frame or opening, usually windows and doors.
- ARCHIVOLT.** The mouldings carried round a curved or arched opening in contradistinction to a rectangular one.
- AREA.** The superficial extent of any plane figure. The void adjacent to a basement. A small front yard, whether sunk or not.
- ARRAS.** Tapestry or heavy hanging or curtain over an archway or opening in a wall.
- ARRIS.** The sharp edge where two surfaces meet and form an acute angle.
- ASBESTOS.** A fibrous mineral naturally incombustible and a slow conductor, used for deafening for floors and for covering steam pipes and tanks or boilers.
- ASHLAR.** A facing of dressed stone to a building. The remainder of the thickness of the wall is termed the "backing," and may be of brick or rubble masonry. A block of ashlar means a squared piece of masonry ready for fixing as a surface material.
- ASTRAGAL.** The small projecting moulding between the column and its capital, sometimes called the necking.
- ATELIER.** A workshop or studio; especially a class-room where pupils are trained in art.
- ATTIC.** The uppermost story of a building. One decorated with simple pilasters. A bedroom with sloping ceilings, or an unimportant top-room with a comparatively low height.
- BACK.** The more remote or further side of any member or part of a building or its rear. In the plural, as "the backs," that side of a row opposite to the fronts.
- BACK-LINING.** The lining or boxing of any recessed feature, such as a window shutter or panelling.
- BALLAST.** Burnt clay, or gravel, or broken brick, usually used for weight or filling purposes, and also when employed as the aggregate for concrete, or as a dry bottom under concrete below floors and buildings.
- BALL VALVE.** The supply stop-cock of a cistern.
- BALUSTER.** A dwarf colonette or moulded column; a portion of a balustrade supporting a handrail, or forming a parapet or low screen. "Banister," a colloquial and incorrect form of the word "baluster."
- BARGE-BOARD.** A gable board, sometimes moulded and often pierced, hung from a roof end, from below the ridge and raking pitch of a roof, and projecting in front of the wall, to conceal the rafters and construction of roof covering.
- BAROCCO.** Extravagant and informal ornament; unexpected and not traditional in style. Devoid of refinement in taste.
- BAS-RELIEF.** Ornament in which the enriched surfaces project but slightly from the background, and are in low relief, as in the frieze of the Parthenon.
- BAT.** A broken brick, excluded from good work as such.

- BATH STONE.** A light cream-coloured oolite free stone, much used in buildings where expense precludes harder and more durable stones.
- BATTEN.** A scantling or plank of timber 7 inches wide and from 2 to 4 inches thick. The word is used for narrow strips of wood covering joints, or forming a fixing on which to attach boards or slates, etc., and this is termed "battening."
- BATTER.** A term applied to the inclined surface of walls built out of the perpendicular, such as in a retaining wall, to add solidity.
- BATTLEMENT.** A parapet with embrasures, generally used in reference to tower tops and walling where alternating higher and lower copings occur as ramparts or crenellated merlons for defence.
- BAULK.** A log of nicely squared timber in the big rough state, not in the log.
- BAY.** One division of a front, arcade, roof, or any structure where the whole consists of a repetition of similar parts.
- BAY WINDOW.** A projecting window; one having square or inclined sides, originally used in contradistinction to a bow window, which is curved or semi-circular on plan. Now the term "bay" means a projecting and, for the most part, any big window.
- BEAD.** A rounded moulding whose section is part of a circle or ellipse. The cheapest form of moulding. Parting bead divides the outer from the inner sash.
- BEAD AND BUTT.** A term in carpentry framing where a bead is worked on one side of a joint, and the other side immediately against it remains square, the plank being flush with the framing rails and stiles.
- BEAD AND QUIRK.** A bead having a sunk channel, called a quirk, worked along its edge either on both sides or one only.
- BEARER.** A timber placed over a void, or used to carry a load of small proportions; "beam" covering bearers of the larger kind.
- BEARING.** Used to denote that portion of a beam or joint which rests on the support. The "clear bearing" or span of a beam is the void or total width between the supports.
- BED.** The natural position of stone in the quarry—the horizontal upper and under surfaces of wrought stone. A prepared layer of cement or mortar or bed on or in which a piece of other material is laid.
- BED-MOULDINGS.** The mouldings of the cornice between the corona and the frieze.
- BELFRY.** An erection built to house large bells intended to be rung by swinging.
- BELL-CAGE.** A timber-trussed frame in which swinging bells are hung.
- BELL-TRAP.** A cup-shaped trap at one time used in sinks, etc., and now practically superseded by more sanitary contrivances such as syphon traps.
- BENCH-MARK.** A term in surveying for a permanent mark to indicate a level, and as a fixed reference.
- BÉTON.** A French term for concrete, generally having reference to concrete mixed with hydraulic lime to set under water.
- BEVEL.** A slanting edge; a surface inclined at an acute angle.

BILLS OF QUANTITIES. A tabulated statement of the amounts of materials and labour needed in the execution of a contract, and priced by builders as the basis of their tender, and subsequently the schedule of prices.

BINDER, or BINDING JOIST. A timber beam placed between the main bearers or girders of a floor to bring them together. In masonry, a header or a bond stone.

BLOCKING-COURSE. A layer of stone or brickwork placed above the cornice, in the nature of a parapet, weighting the projecting features down into position on their rear ends or bed.

BLOCK-PLAN. One indicating the general outlines of buildings and the principal features only, and those mainly in outline only.

BOARDING. Timber sawn into planks of various thicknesses. Boards in general.

BOASTING. A mode of dressing or finishing the surface of masonry. The first process or preparation for a finer finish.

BOLT. A thin rod, pin, or bar of iron. A rod generally of wrought iron or steel terminated by a head at one end, and having a screw nut at the other. A jag-bolt has a jagged or roughened head, or caulked ring turned up and down.

BOND. The tie or binding of jointing masonry and brickwork so as to make solid work by laying one piece across two or more pieces or parts. Used also in carpentry in regard to framing.

BOND TIMBER. Horizontal layers of woodwork following the dimensions of bricks, and built into walls to equalise the pressure and to serve as ties.

BOSS. A projective mass of stone on the surface of a wall, to be cut away subsequently. Also a permanent carved and raised ornament at the intersection of ribs or groins in vaulting. The head man, master, or foreman on a building is known among the men as "the boss."

BOW WINDOW. *See* BAY WINDOW.

BOXINGS. The wood casings of a window made to receive folding shutters. Rough casings to protect work in progress.

BRACE. An inclined tie or strut of timber used in roofs and partitions to stiffen or steady another part of the work.

BRACKET. A projecting support of the nature of a corbel.

BRAD. A thin-cut nail with a slight projection on one side to form the head.

BREAK. A change in the continuity of a wall-face, such as a chimney breast or set-off in a wall.

BREAK JOINT. The arrangement of stones or bricks whereby no vertical joints occur immediately above one another. The lap of one brick or stone over the other.

BREAST. The projecting breast of a chimney is the thin wall immediately over the fireplace. That piece of wall between a window-sill and a floor.

BREEZE BRICKS. Concrete bricks built in walls to give a good fixing for joiners' work.

BRESSUMMER. A wooden beam or girder placed over a void to support a super-imposed structure. *See* FLITCHED GIRDER.

- BRICK NOGGING.** A mode of filling in the spaces of a timber partition or half-timber external work with thin brickwork. The bricks so used are often set herring-bone wise, viz. diagonally.
- BRICK TRIMMER.** A brick arch turned under the hearth of a fireplace, to carry same and obviate timbers being used in a position where they would be liable to catch fire.
- BRIDGING JOIST.** A small beam of timber placed between binders to carry the flooring boards.
- BROACH.** A method of constructing the springing of an octagonal spire from a square tower. In old English, any spire.
- BUCKLE.** To bulge or deviate from the normal under excessive pressure.
- BULK-HEAD.** A hood or covering of thin framing or concrete to gain more headway; or obtain light, as under shop windows, to basements.
- BULL'S-NOSE.** The obtuse angle rounded outwardly at the corner of two walls.
- BUTT.** A square end of timber; a square joint.
- BUTT-HINGE.** A common folding hinge, used for hanging doors, casements, etc. Three butts are described as one and a half pairs.
- BUTTRESS.** A pier or projection to strengthen a wall, either built into it to resist a thrust or isolated and connected by an arch when "flying buttress" is employed.
- CAMBER.** An upward curve given to beams or trusses to counteract the tendency to sag or drop below the level line, owing to their weight or the load they may have to carry. A so-called *flat* arch usually has a slight camber in its soffit.
- CAMPANILE.** A detached tower, and generally erected without buttresses.
- CANARY WOOD.** American white wood, admirable for fittings or furniture where hard wood cannot be afforded, easy to work and close-grained, which takes stain and varnishes well.
- CANTILEVER.** A true or projecting girder to support a balcony, cornice, etc., or any overhanging weight. A framed bracket.
- CAP—CAPITAL.** The uppermost or crowning part of a column, usually enriched or moulded.
- CARCASS.** The bare walls of a building roofed over, but containing only the partitions and joists, and no plastering, windows, sashes, flooring, or finishings of any kind. A building finished in carcass as to its main construction becomes qualified for a first mortgage often obtained by speculating builders.
- CARRIAGE.** An inclined beam for supporting a stair.
- CARRY UP.** To build vertically, as distinct from horizontal extension.
- CARTOUCHE.** A scroll ornament, like an escutcheon or shield or oval to receive an inscription or coat-of-arms.
- CARYATID.** A carved female figure, usually on a tapering pier, used as a support in lieu of a column. Whole-length female figures also are so described.
- CASEMENT.** A window sash with hinges. A French casement hung folding opens thus down to the floor. A pivot hung sash opening outward or inward.

- CASING.** The timber-work covering pipes, or rough boarding placed over enrichments for their temporary protection during the erection of a building. A shell or boxing of superior material over a structural feature desired to be enriched or hidden.
- CAULKING.** The method of tightening a water- or gas-pipe joint. The method of securing the end of a beam or bar.
- CAVETTO.** A deeply hollowed or concave moulding, chiefly used in internal cornices, and usually a quarter round in section.
- CENTERING.** A timber framework or mould, forming the support to an arch or vault during its construction. "Striking" centering is the act of removing it subsequently.
- CHAIN TIMBER.** Bond timbers placed in walls and united at their extremities to form ties.
- CHAIN RAIL.** A horizontal moulding protecting walls from damage by chairs, and forming often the top of a dado.
- CHAMFER, or CHAMFER.** A mode of removing the arris or sharp edge of wood or stone work by cutting it off at an obtuse angle with each face or surface. When the bevel does not run through and mitre with the framing the chamfer is termed a stopped-chamfer.
- CHANCEL.** That part of church divided off by a screen and reserved for the choir and clergy, where the offices of the Eucharist are said and the altar is situated.
- CHANNELLING.** The vertical flutings on columns; or a stone gutter.
- CHASE.** A groove or channel in a wall to take pipes, wires, and flues.
- CHEEKS.** The vertical sides of a dormer or gable rising above the slopes of a roof or flat.
- CHIMNEY-SHAFT.** A stack of flues rising above the main wall of a building or roof. A factory tall chimney.
- CHUTE.** An inclined or vertical trough for conveying materials to a lower level.
- CILL.** *See* SILL.
- CINQUE CENTO.** Italian art or style of decoration of the sixteenth century (1501-1599).
- CLAMP.** A mode of joining several boards by a cross-piece screwed on the back, or housed in partly into boarding, or grooved and tongued to the ends of them. A rough stack of bricks for burning without a kiln.
- CLEAR.** The unobstructed void between the bearings. The narrowest part of an opening is denoted by such and such a dimension in the clear.
- CLINKER.** A small hard brick for paving. Bricks fused and run together by the heat of the furnace.
- CLOSER.** The last brick or stone laid in a course. A short end of a brick, under $4\frac{1}{2}$ inches in length, having an unbroken end fit for faced work.
- COAT.** One layer of plaster, paint, or other composition.
- COIN, or COIGNE.** *See* QUOINS.
- COLLAR-BEAM.** A beam uniting an opposite couple of principal rafters or common rafters at or near their centres.

CONCRETE. Pebble-stones, ballast, breeze, or other hard aggregate united by lime or cement. See **BETON**.

CONSOLE. A bracket corbel or truss, the depth of which is generally greater than its projection; and the term is restricted to ornamental features rather than primarily structural ones.

COPING. The covering or cap on the top of a wall; such surface is generally inclined to throw off the water.

CORBEL. A projection from a wall in the nature of a bracket to carry a superincumbent weight. Usually of stone.

CORNICE. The crowning member of the entablature or top projecting course of any structure.

CORONA. The upper or crowning members of a cornice.

CORRUGATED IRON. Sheet iron, the surface of which is drawn or rolled into a series of waves or flutings, like ridges and furrows. It is almost always galvanized, and varies much in quality.

COUNTERFORT. A pier or buttress to support a dwarf wall or revetment. The spur walls of a basement or abutment.

COUNTERSINK. A hole or recess from the face of the material to admit the head of a rivet, screw, etc., and leave all flush.

COURSE. The individual layer of bricks or masonry.

COVE. A bold hollow used in an internal cornice, or under the eaves of a roof, or below a projecting story of a building, or under an oriel window.

CRADLE. A light framework forming the support or backing for other work, like the plastered imitation of a vault or arch.

CRADLING. The timber grounds or arched pieces fixed to form arched or curved soffits of ceilings or coved cornices. The timbers on which to build arched masonry.

CREASING. A course of tiles or slate under eills or the coping of a wall or a chimney-top, to throw off the water and exclude it from soaking into the work.

CRESTING. An ornament for the ridge of the roof formed of metal or tiles. The enriched pierced member of wooden screens, etc.

CRICKETS. The foliated ornaments on the angles of a pinnacle, pediment, spire, or gable.

CROSS-TONGUED. See **TONGUE**; same description, save that the tongue is worked across the grain, viz. sawn into the required width cross-way of the stuff. This is stronger as a tongue than when the tongue runs longways with the grain.

CROSS-WALL. Any wall not an external or party wall, but carried up two-thirds of the height of the building (Building Act).

CROWSTEP. The step-store of a stepped gable, as in Scotch buildings.

CUBICLE. A small bedroom enclosed by screens not going up to the ceiling. They are common in Rowton houses and schools' dormitories.

CULVERT. An arched drain or covered watercourse.

CUPOLA. A bowl-shaped vault or dome.

CURB. Vertical edging to a footway. A horizontal member set at the junction of two slopes rising one over the other in a roof; hence curb roof.

CURTAIL. The rounded step at the foot of a staircase and outside curve of handrail.

CUSP. The point formed by the intersection of two foils.

CYMATIUM. A moulding named by Vitruvius, the section of which is partly convex and partly concave, **S**-shaped, or ovolo. See **OGEE**.

DADO. The lower wall surface round an apartment, consisting of the plinth or skirting, the die, and the chair-rail or capping. A panelled wooden dado is termed the wainscot, and then it is generally somewhat high relatively in the room.

DAMP COURSE. May be vertical as well as horizontal. If the latter, in walls to prevent the damp in the soil from rising, the damp-course is located a few inches above the ground level throughout the entire thickness of the walling. If vertical, it is put outside the wall against the earth. Asphalte of the rock kind is the best damp-course. Bitumen felt is used in cheaper work, and slates laid overlapping in cement are largely used. Corrugated iron of dovetail section is also employed bedded in Portland cement.

DEAD LOAD. A stationary load, as distinguished from a live load of persons.

DEAL. A scantling of timber 9 to 11 inches wide and 3 to 4 inches thick, in pine or fir.

DENTIL. A rectangular block, forming one of a series set in a row, forming part of the classic cornice. Also in Venetian Gothic work in moulded strings.

DIAPER. An ornament consisting of a repetition of similar parts in a flat, unbroken surface.

DIE. The cube, or the plain portion of a pedestal between the cap and base.

DILAPIDATION. The decay of a building owing to want of proper repairs over and above that arising from due wear and tear. The makings good needed to put a building into habitable condition are called dilapidations.

DIMENSIONS. The scantlings of the various parts of a building, usually figured on working drawings.

DIRECT LABOUR. Building without a contractor or builder by employing labour and buying materials in the open market, the aim being to save the builder's profit, and by doing without his experience buying your own.

DISCHARGING ARCH. See **RELIEVING ARCH**.

DISTEMPER. Colours prepared for painting without oil, generally mixed with size.

DORMER. A projecting window in a sloping roof or on the face of a spire.

DOUBLE HUNG. Sashes which open one above the other, and made to slide vertically past each other, and balanced by weights to facilitate their action.

DOVETAIL. A joint used in carpentry, resembling a bird's tail, and fitting one into the other.

DOWEL. A pin connecting two parts together at a joint by a peg, stud, or small tongue fitting into a recess prepared for it, termed a dowel-hole.

DRESSINGS. All moulded and enclosing portions of the work, such as the masonry round doors and windows, or the quoins.

Drip. A projecting moulding, undercut so as to throw the rain off the walls.

DRIPTONE. The hood-moulding over openings in Gothic buildings.

DRY-ROT. A fungus which attacks timber in damp, ill-ventilated parts of buildings. Remedy: entirely remove the affected part and ventilate.

DUBBING OUT. Levelling a wall by filling up the interstices before the final coat of stucco is applied.

EAVES. The projection of a roof beyond the wall of a building.

EGG AND TONGUE. An enrichment of this form used in classic cornices, called also the echinus.

ELEVATION. The drawing of the front of any object or structure in geometrical projection.

ENCAUSTIC TILE. Where the colour is incorporated with the body of the clay from which it is burnt.

ENTABLATURE. The horizontal structure supported by columns, consisting of the architrave, frieze, and cornice of classic architecture.

ENTASIS. The swell or convex curvature of the shaft or column in classic architecture.

EXTRADOS. The external curve of the voussoirs of an arch, as opposed to the intrados or curve of the underside of the arch voussoirs.

FACADE. The face or front of any structure; the front elevation. Only appropriate when the building has architectural character, which the word implies.

FACIA, or FASCIA. A smooth, plain surface or flat projection, usually applied to the broad feature of a cornice, as name-plate over a shop front.

FAN TRACERY. A mode of forming vaulting in the late Gothic work, in which four-centred groining was much elaborated with radiated panelling, often very beautifully designed.

FASCIA. See FACIA.

FEATHER-EDGE BOARDING. Planks with a wedge-shaped section, or so bevelled that one edge runs out to a sharp arris.

FIBROUS PLASTER. Slabs of curved, flat, or ornamented shape, made in various sizes, cut and screwed up almost as easily as woodwork.

FILLET. A small square moulding, or narrow, flat face, or plain band in a group of mouldings. A thin strip of material.

FINIAL. The crowning ornament or terminal of foliage on Gothic pinnacles, canopies, stalls, etc. A culminating feature on a roof.

FIR TIMBER. The product of the Baltic fir forests, chiefly used for rafters and joists and structural framings.

FIREBRICKS. Bricks made of a highly refractory clay.

FIREPROOF FLOORS. Fire-resisting is really the more correct term. Floors constructed of iron joists or girders or rods, with the intervening spaces filled with firebrick or concrete. These floors are also built entirely of concrete, and in combination with hollow and locking tiles or blocks.

FLANK WALL. A cross wall, or lateral one, at right angles to a party wall. The valley of a roof in Scotland is termed a flank.

FLASHING. Pieces of lead or sheet metal covering the angles of a roof next any vertical surface, such as chimney, dormer, or parapet, the object being to exclude the wet.

FLAT. An apartment house, complete in itself, but forming only a part of a big block of buildings. A space roofed over as nearly level as possible. In painting, having little or no gloss, a dead surface, which is called flattening.

FLECHE. An elegant, spire-like turret, large or small. The term may apply to a tower stage of any such erection, but so used is uncommon.

FLEMISH-BOND. A mode of laying bricks in courses of alternate headers and stretchers, as distinguished from English-bond, in which the courses are all headers and all stretchers.

FLITCHED GIRDER. A bressummer of two thicknesses of timber (generally the same beam sawn in half and reversed), and having an iron plate bolted between them, and cambered somewhat.

FLUSH. On an even surface with another. In masonry and brickwork, to fill up with cement or mortar. To scour out sewers by the discharge of a large volume of water. To chip off stonework close to a joint, to prevent fracture of the surface when masonry is heavily loaded near the edge.

FLUTINGS, or FLUTES. Vertical grooves or channels in columns or pilasters, tapering or in parallel decorative lines.

FLYERS. The term applied to those steps in a winding staircase whose risers are parallel. *See* WINDERS.

FOILS. Smaller intersecting circles, such as trefoil, quatrefoil, cinque foil or quinte foil, sexfoil, and multifoil, or in the heads of Gothic arches and tracery, with cusps and other elaborations of delicate detail.

FOLDING DOORS. Large doors made in two halves, hinged on either side, and shutting against each other. Very wide doors are thus named. Folding shutters may be in narrow widths or leaves, and be encased in panelled boxings in window reveals.

FOOTINGS. The spreading courses at the bottom of a wall, projecting beyond the face in steps, in order to increase the bearing. The term does not necessarily include the concrete below the wall set-offs.

FOUNDATION. The sub-structure of an edifice, which may consist of piles, stone slabs, or concrete, according to the nature of the site. The excavations for the sub-structure are falsely thus termed. Foundations would be understood to include the concrete.

FRAMING. The joining together timber into trusses or partitions. The building up of a large structure by smaller parts; a mode of forming thin partitions of stiles, rails, and panelling.

FREESTONE. Soft limestone or sandstone which can be worked freely in any direction, and very homogeneous, and suitable for carving and other delicate treatment.

- FRESCO.** Painting on fresh wet plaster, the colours drying and hardening with it. The term is wrongly used to include every kind of decorative mural painting either in oil or distemper, and even encaustic work.
- FRET.** An enrichment consisting of a repeat of similar forms in bands and rectilinear forms, intersecting, and perforated either in wood or metal, etc.
- FRIEZE.** The central and chief portion of an entablature situated between the architrave and cornice. The word "frieze" applies to classic and renaissance work, and seldom to mediæval architecture.
- FRONTAL.** The vertical hanging of an altar. Formerly the word was used to describe a small pediment over a door or window.
- FURNITURE.** The ironmongery and knobs, locks, and hinges used in connection with joiners' work.
- FURRINGS.** Thin strips of timber nailed on joints or other timbers to make up their thickness or to render their surfaces level, or bring them up to the required shape.
- GABLE-END, or GABLE-WALL.** The vertical termination of a roof.
- GARGOYLE, or GURGOYLE.** A projecting carved spout to discharge the rain-water clear of the walls of the building, generally made in stone, and sometimes in lead. In Germany iron is used.
- GARNET, or CROSS-GARNET.** A form of hinge which extends across the surface of the door, and is understood to mean a cheap form of hinge, unless the term is qualified by a special description.
- GAUGE.** To bring to a given thickness or dimension. The distance apart between the several courses of slates or tiles. To mix up plaster or cement. To add plaster to "fine stuff" to render it quick-setting, termed "gauged stuff." Coarse stuff is sometimes gauged for a similar purpose. Gauged arches are those whose voussoirs are rubbed to a true gauge.
- GESO DURO.** Hard plaster moulded and applied to surface decoration, gilded and coloured in clear tints with elaborate effect.
- GIBBS AND KEYS.** An iron slot with wedges to form a joint in timber trusses.
- GIRDER.** A beam of iron or timber. The chief timbers in double-framed floors. In their more elaborate form they are called trusses.
- GLUE GLASS.** Glass with the surface frosted in fern-like patterns by gluing it over before subjecting it to reheating in a furnace, when the expansion and contraction produces the pattern.
- GRAFFITO, or SCRUFFITO.** Plastering inlaid with plaster of another colour in decorative forms. The surface of the ground is scratched out to the form required, and filled in as the work proceeds with other colours.
- GROIN.** The arched line formed by the intersection of vaults. When projecting, as in a ribbed vault, a common error is to term the rib on the diagonal a "groin rib."
- GROOVE AND TONGUE.** A mode of joining boards edgewise, one board having in it a groove or rectangular channel, and the other a projecting fillet or tongue fitting into the groove. This is termed "matched boarding."
- GROUND SILLS or PLATES.** Longitudinal timbers laid on deeper-walls to support the floor-joints.

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GROUNDS. Pieces of wood nailed to walls previous to the plastering, and of the same thickness, to form the groundwork for skirtings, architraves, linings, etc.

GROUT. Thin mortar or cement wrongly used for flushing up the joints and filling in the interstices of a wall.

GUILLOCHE. An ornament formed of intersecting circles, or discs disposed in a band, differing from a fret or meander, which is composed of straight lines.

GULLY. A grated opening for the discharge of water, usually trapped, and used for surface water or rain-water pipes and sink "waste."

GUTTER-PLATE. The timber support under a gutter.

HALF-TIMBERING. A mode of construction in which the framework is of timber and the spaces filled with plaster or thin brickwork, and flush, or nearly so, with the timbering, which shows and makes a feature in the design.

HALVING. A plan of jointing timber, where half the thickness of the upper timber is cut away and the remainder is sunk into a corresponding recess formed in the under timber.

HAMMER BEAM. A part of a truss used in Gothic roofs. Westminster Hall is a notable example of a hammer-beamed roof.

HANGING STILE. The stile to which the hinges are attached.

HATCH. A small door to a cupboard or to an opening from one room to another.

HAUNCH. That part of an arch immediately above the springing between the crown and the abutment of an arch.

HEAD. The lintel or upper member of a frame. The top of a rain-water pipe.

HEADERS. Bricks set so as to present their ends towards the front face of the wall.

HERRING-BONE STRUTTING. Short cross-pieces of timber wedged diagonally between the floor joists to keep them rigid.

HIP. An external angle formed by the intersection of two slanting roofs.

HOOD. A troughlike box carried on the shoulder of a man mostly to convey mortar or bricks on to a scaffold.

HOGGIN. Fine gravel.

HOOD-MOULD. The water-table or dripstone projection over openings in mediæval buildings.

HOUSINGS. The channels formed in the string of a staircase to receive the steps. The groove in one piece of material to receive the edge or end of another piece.

IMPOST. The stone at the top of a pier which receives and forms a stop to the archivolt. One stone often embraces the impost and the lower part of the haunch in itself.

INTERCOLUMNIATION. The spaces between columns.

INTERFENESTRATION. The space between windows.

INTRADOS. The under surface of the voussoirs of an arch or vault.

INVERT. An arch turned with the crown downwards, placed between two piers, to equalise their bearing, or the floor of an arched culvert or sewer.

ISOLATION CHAMBER. This term describes the disconnecting manhole at the lower end of the drainage system of a premises, and located immediately within the confines of the property, and where the branch from the main is entered into by the private drains. A syphon trap with an inspection eye is introduced at the lower end of this chamber into the outfall drain leading to sewer, thus trapping the private drains off from the pressure of gas in the sewer. A fresh-air inlet is provided in the chamber to promote upcast of air in the ventilating pipes situate at the head of the drainage on the premises in question.

JACOBÆAN. Architecture and furniture of the reign of James I., or during the period of the Stuarts, generally the seventeenth century.

JAMB. A vertical support in the nature of a pier or post. The lateral upright surfaces of a frame or aperture.

JOGGLE-JOINT. A mode of joining masonry with a tongue of hard material turned on one piece to fit into another. Also a joint used in timber trusses in such timbers as abut one against the other. See *SEAM*.

JOISTS. The timbers forming the supports of single floors or ceilings.

KEENE'S CEMENT. This cement gives a very hard fine surface, and can be polished with admirable results. It is used for facing interior walls where a durable finish is required. All angles even in common work inside buildings when plaster is used are executed in Keene's cement. It is obtained by soaking plaster in alum water after a first calcination; it is then kiln burnt a second time and ground. The word "Keene's" implies this cement.

KEystone. The central voussoir of an arch.

KING-POST. The central timber of a roof truss, which carries the ridge and the ends of the principal rafters, and rests on the tie-beam.

KITCHENER. A closed cooking range with regulating flues governed by dampers. Open fire arrangements are used also in kitcheners, but where much hot water is needed the boiler gains the advantage in closed fire kitcheners without the open fire adjustment.

KNOTTING AND STOPPING. Painting over the knots with red lead and stopping all defects, cracks, and crevices in woodwork with white lead. Preparing the work for the painter.

LANCET WINDOW. An acute arched window distinguishing the style of the thirteenth century, and known as Early English.

LANDING. A large slab of stone. The top of a flight of steps.

LANTERN-LIGHT. Any structure rising above the roof of a building and having a top opening for light. A belfry over a tower or over the crossing of a church, or even a central tower itself, is called a lantern.

LAP. The width from the nail of the lower slate or tile or board to the lower extremity of the upper slate or tile or board.

LAPIS LAZULI. A hard rock of rich azure blue, with a vitreous lustre, used with marble for inlay with handsome effect.

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- LATH.** A thin strip of wood used for hanging tiles and for plastering. Metallic lathing of expanded meshed metal is very commonly employed for plastering with much advantage.
- LATRINE.** A continuous troughed convenience for human defecation, used in barracks, schools, and public places.
- LEDGE.** A board nailed across a number of other boards to keep them in place, as a cleat; batten doors are thus constructed and hung with cross garnet hinges screwed to the ledges.
- LEDGERS.** The horizontal timbers in scaffolding which connect the poles used to carry one end of the putlogs supporting the scaffold boards.
- LEWIS.** A wedged contrivance for lifting stone by means of split keys, which fit into a dovetail hole cut in the stone.
- LICH STONE.** The block on which the corpse is rested at the entrance to a churchyard until the priest arrives. Lich gates with roofed gables were very common to give shelter over the mourners awaiting.
- LININGS.** The boarding used to cover internal surfaces, as jamb lining, window back lining.
- LINTEL, or LINTOL.** The timber or stone placed across an aperture in a wall, and carrying the weight of wall over same.
- LISTED BOARDING.** Such as has had the coarse, rough edges and sap-wood removed, but otherwise left as sawn from the log.
- LOGGIA.** A roofed-in structure open on one side, for sheltered open-air occupation, and architecturally treated as a prominent part of a building. A verandah is a lighter form of loggia.
- LOOPHOLE.** The open part or crenel in a battlement, or a narrow slit for discharge of projectiles. Loophole frame, a wooden frame enclosing a door below and light above.
- LOUVRE BOARDS, or LUFFER BOARDS.** Boards placed one over the other in a slanting position to allow of the admission of fresh air or outlet for smoke and ventilation generally. They are used in belfries to give free passage for sound, and at same time exclude the weather.
- MANSARD ROOF.** The French name for a curb-roof, or one of which the principal rafters are kneed.
- MARQUETRY.** Inlaid patterned woodwork, generally executed in veneers on a wooden ground. Intarsia work is similar, but generally has a continuous foliated or figure design in one colour, extending in a definite manner over a large ground or surface.
- MEETING RAIL.** The upright in the centre of a folding door, or the top rail of a lower sash and bottom rail of the top light half of a sliding sash window, where the rails lap one in front of the other.
- MEZZANINE.** An intermediate story within the height of a principal story, which corresponds with the "entresol" in France.
- MITRE.** The bevel or line of intersection between mouldings, meeting at any inclination or angle.

MODILLION. A small bracket in classic architecture supporting the crown of a cornice.

MORTISE AND TENON. A mortise is a hole cut in timber to receive a tongue of the same size formed on another piece of timber called the tenon. The two parts fixed together form a joint thus named, and are either wedged in position or pinned.

MOSAIC. Decoration of floors or mural surfaces by means of glass, marble, or other durable materials fitted into patterns or scheme of colour in small pieces of varied shapes.

MOULD. The pattern or profile of an enriched string or cornice. The shaped tool used for running plaster mouldings.

MULLION. The upright divisions of stone or timber which divide windows into two or more "lights," or which separate different panels.

MUNTINGS. The smaller forms of horizontal divisions of windows.

MURAL PAINTING. Decorations on walls. Fresco and encaustic painting, oil-painting, and even water-colouring on walling.

NAKED FLOORING. The floor supports considered apart from the floor-boards and ceiling.

NARTHEX. The large porch or vestibule building of a church across the west end at the greatest distance from the high altar or sanctuary.

NEWEL. The central shaft or corner posts of a staircase supporting the strings which carry the steps, and also used to support the handrails.

NICHE. A recess or cavity in the thickness of a wall, usually destined to receive statuary or other decorative object.

NOGGING. A mode of filling the space of quarter-partitions with brickwork.

NOSEING. The rounded edge of the tread of a step—a rounded edge to a board or table top.

OFF-SET, or SET-OFF. The ledge formed by a decrease in the thickness of a wall or the recessing of any structure.

OGEE. A moulding formed of a convex and concave curve meeting in the form of an S; also called Cymatium.

OOOLITE. A geological formation supplying many excellent building stones, as Bath, Portland, etc.

ORDER. The combination of architectural features constituting a style. Doric, Ionic, Corinthian, Tuscan, and Composite.

ORIEL. A bay window supported by corbelling out from the wall, and more especially an upper window overhanging.

ORIENTATION. The practice of placing churches so that the priest faces the east when standing before the altar in celebrating.

OVERMANTEL. A continuation of the fireplace above the mantel-shelf. Over door, a feature above the top of a door frame.

OVERSAILING-COURSE. A course of brickwork or masonry whose face projects beyond the one beneath it.

OVOLO. A rounded moulding whose section is a portion of a circle or of an ellipse, approximating to a quarter-round in section.

PANEL. The filling of an intermediate space between framing, generally of thinner boarding; or recessed in masonry, a space enclosed by raised mouldings. Linen panel is one enriched by a folded or linen pattern. Flush panel is level with its enclosing framework.

PANTILE. A curved tile, sometimes called a Dutch or Flemish tile, $14\frac{1}{2}$ by 10 inches.

PARAPET. A vertical screen-wall at the foot of a roof or on the summit of a building. Any fence wall to a bridge or terrace is so called.

PARGETTING. A mode of lining flues with a mixture of mortar and cow-dung. The external plastering of half-timbered houses is called parge-work, or pargetting.

PARIAN CEMENT. Plaster of Paris or Gypsum is the cement used for running cornices or casting enrichments. For wall facings it is admirable and gives a fine surface for oil paint, which can be applied almost immediately.

PARTITION, or QUARTERED PARTITION. A framework of timber studs or quarters, covered with lath and plastering, or filled in with brick nogging, to divide rooms. Partition also applies to slab or placed worked concrete, divisional walling, now very commonly used, occupying less space, and being more fire-resisting than quartered partitions.

PARTY-WALL. An abbreviation of partition wall, or the wall to divide adjoining premises, and possessed in common by owners of adjacent properties.

PATERA. A circular ornament of slight projection, placed on a flat surface.

PEDESTAL. The lowest members of the classic orders, consisting of the base, the dado, and the cornice or surbase.

PEDIMENT. The triangular structure or curved formed erection fronting the sloping lines of the roof and on the top of the cornice of a portico. The space enclosed within the pediment is called the tympanum.

PENDANT. A hanging or suspended ornament, as in the vaulting of Henry VII.'s chapel, Westminster, or the terminal of a staircase newel projecting vertically below the ceiling or string.

PENDENTIVE. The curved spandril between the square or octagon base and the circular vault of a dome. In joinery the timber curved ribs used in arched or vaulted ceilings are called the pendentive cradling.

PENSTOCK. A movable sluice or floodgate.

PIER. A narrow supporting wall. The solid portions between the windows and doors of a building are called piers; also the supports of arches and bridges.

PILASTER. A square column, generally only slightly relieved from the walls, and which may be a half or a quarter pilaster, according to the projection.

PILE. A timber beam generally having a pointed iron shoe, and with a ring near its top end for driving into the ground to obtain a foundation on which to erect a structure. Concrete piles are largely used in lieu of timber with much advantage.

- PINE.** A term generally applied to American timber, as opposed to fir, or Baltic timber; used more particularly in joinery. White, yellow, and red are the three kinds stated in the ascending scale of value.
- PINNING-IN.** The mode of fixing stone into walls with small wedges of slate or hard material. Stone steps and landings are pinned into chases prepared for them. See UNDERPINNING.
- PITCH.** The inclination or vertical angle of a roof is called its pitch. The pitch is really the proportion between the rise and span; thus a quarter-pitch roof is one whose vertical height is equal to a quarter its span.
- PLACE-BRICKS.** The soft, rotten bricks which are imperfectly burned.
- PLAIN TILE.** The common flat tile in general use—10½ by 6½ inches.
- PLATES.** Horizontal timbers placed under rafters and joists to distribute the load.
- PLINTH.** A square member forming the base of a pedestal or building; in the latter it takes the form of a moulded or splayed offset.
- PLOUGHED AND TONGUED.** A method of jointing timber by forming a groove on one side and a tongue on the other. See GROOVE AND TONGUE.
- PLUGGING.** Preparing brick walls by the insertion of conical wooden wedges for the reception of nails or screws. Breeze bricks are built into walls for the same purpose, and give a better fixing in many ways than wood plugs driven in.
- PLUMB.** Perpendicular or vertical; an upright wall or pier is said to be plumb.
- POINTING.** Finishing the external joints of masonry or brickwork with special mortar-joints after the work has been built and cleaned down. Struck joints as the work proceeds avoid pointing, and insure better brickwork and better bricklaying. Re-pointing is done by raking out the joints and "tuck" pointing them. Such tuck work soon perishes and gets dislodged by the weather. All joints should be weathered without projecting from the face of the wall.
- POLE-PLATE.** A timber placed in the wall horizontally above the tie-beam and wall-plate to receive the ends of the roof rafters.
- POLING-PLANKS.** The rough boarding used to sustain the earth-work in foundations and the sides of trenches.
- POPPY-HEAD.** A carved finial on pew-ends or stalls in Gothic churches.
- PORTICO.** An externally projecting porch or entrance, composed of a series of columns or pillars. If of four columns, the arrangement is "tetrastyle;" if of six columns, "hexastyle;" if of eight, "octastyle."
- PORTLAND CEMENT.** This material introduced about 1813 is made from lime-stone and clay. The best quality comes from Kent. The mud of the river Medway is mixed with chalk and ashes from former makings, and calcined at a heat amounting almost to that of vitrification. It should weigh from 110 to 112 lbs. per struck bushel. Portland cement has superseded Roman cement, and it is the strongest and most durable cement in the market. It varies very much in quality, and foreign makes are to be avoided, while it is essential in all concrete structural work that only the best quality should be used. "In cement" implies Portland cement if no qualification is given in a specification for such work.
- POST.** A term applied to all vertical timbers used in construction. See KING-POST.

POZZOLANO, or PUZZOLANO. A volcanic earth brought from Italy, which renders fat limes eminently hydraulic when mixed with them for mortar.

PRICKING-UP. The first coat of plastering on lath.

PRIMING. The first coat of paint applied to timber and iron-work.

PRINCIPAL, or PRINCIPAL RAFTER. The outer inclined timbers of a roof-truss.

PROFILE. The mould or gauge used by plasterers in running mouldings. *See* **SIRICKLE.**

PUDDLE. Tempered clay used to retain or keep back water, owing to its impervious character.

PUGGING. Dry lime, rubbish, or concrete mixed with hair or chopped straw introduced between rafters or floor joints on sound boarding, to prevent noises from penetrating through floors.

PUG-MILL. A machine for mixing together the various ingredients used for mortar-making. By "mortar-mill" is meant an edge-runner.

PUNCHEONS or STUDS. Short upright timbers used in quartered partitions.

PURLINS. Horizontal timbers notched on to principals to support the common rafters.

PUTLOGS. Short timbers used in scaffolding, which are supported at one end on the wall, and at the other on the ledgers.

PUZZOLANO. *See* **POZZOLANO.**

QUANTITIES. *See* **BILLS OF QUANTITIES.**

QUARRY GLAZING. Leaded glazing in small panes either in clear or sanded glass, in colour or plain. The quarries may be ornamental and shaped, or square and diagonal.

QUARTERING. Timber of small scantling; generally deals cut in 3 or in 4.

QUARTERS. The upright timbers or studs used in partitions.

QUEEN-POST. A timber used in a roof-truss; there are always two queens in a queen-post truss.

QUIRK. A small hollow or **V**-shaped channel used with a bead or ovolo

QUOINS. The angles of brick or stone walls, with reference more particularly to the material used in the extremities.

RABBIT. *See* **REBATE.**

RAIL. The horizontal members of door and window frames. The rail of a stairs is called the "handrail." The moulding round a room, from whence to hang works of art by hooks and cords or wires, is called a "picture rail," and as such presupposes its being strong and grooved at top to receive the hooks weighted by pictures.

RAKING. Inclined at any or oblique angle; the slope of a roof is said to rake; joints are raked out to prepare for pointing.

RAMP. The sharp curve in hand-railing where the rise is very rapid at a half-space or quarter-space.

- REBATE.** A shallow recess in the side of a frame or board. See **RABBIT**.
- REBATED FRAME.** One having round it a sunk recess of the thickness of the door or sash.
- RECESS.** A cavity in the thickness of a wall; the remaining thickness of wall is termed the back of the recess.
- REDUCED BRICKWORK.** Brickwork calculated for the purpose of measurement as $13\frac{1}{4}$ inches thick. 272 feet of reduced work = 306 cubic feet is termed a rod, and on this calculation the price of a building is always based.
- REINFORCED CONCRETE.** A method of strengthening concrete construction by iron joints, rods, and ties, whereby very wide spans can be utilized and heavy loads safely carried with the minimum amount of material, the ironwork being entirely embedded in the concrete.
- RELIEVING ARCH.** An arch thrown over a flat-headed opening to distribute the superincumbent weight on the side piers.
- RENDERING.** The first coat of plaster on naked brick or stone—the second coat is termed the “floating coat,” and the third the “setting” or “finishing” coat.
- RETAINING-WALL.** One used to retain earthwork at a steeper angle than it would assume naturally.
- RETURN-WALL.** One at right angles to an external wall or a party wall.
- REVEALS.** The returns or retreating surfaces of an aperture due to the thickness of the wall in which it occurs.
- REVETMENT.** A retaining wall.
- RIB.** A curved or arched beam; the projecting masonry, arches, or mouldings which constitute the main constructional essentials of a vault.
- RIDGE.** The long, narrow plank forming the crest of a roof; it is generally finished with a rounded top, called the ridge-roll. The apex of the roof.
- RISER.** The vertical face of a step, which carries the horizontal face or tread.
- RIVETS.** Short metal bolts, which are hammered red-hot into iron plates to connect them together.
- ROD.** A measure of length or surface. A square rod of brickwork is 272 $\frac{1}{2}$ square feet of brickwork $13\frac{1}{4}$ inches thick, or 306 cubic feet of brickwork.
- ROOF-TIE.** The wood beam or iron tie connecting the feet or ends of the principal rafters.
- ROSE WINDOW.** A circular window filled with tracery, radiating or otherwise.
- ROUGH-CAST.** A mode of finishing external plastering by dashing against it small pebbles or broken flint, mixed with lime, to give it a rough face. See **Stucco**.
- RUBBLE-WORK.** A common description of masonry, in which the stones are set irregularly, without reference to courses.
- RUSTICATION.** A kind of masonry in which the angles of the several stones are splayed, so as to produce **V-joints**, the stones projecting beyond the general surface of the wall, having a more or less roughened surface.
- SAG.** The tendency of loaded beams to drop below the level in their centre.
- SASH.** The timber framework of a window.

SCAGLIOLA. A composition made in imitation of marble, and used for columns, pedestals, etc.

SCANTLING. Quartering or timber of small size.

SCANTLINGS. The sizes or figured dimensions of timber work or iron framing. The dimensions of builders' work are termed the scantlings.

SCARF. The mode of splicing together beams of timber by halving or notching them and bolting them together.

SCOTIA. A hollow moulding used in classic architecture.

SCRAFFITO. *See* GRAFFITO.

SCREEDS. The wooden rules used by plasterers to run their mouldings; also the narrow faces, run at intervals on flat surfaces, by which the plastering or floor rendering is levelled.

SCRIBING. Fitting any piece of wood or metal so as accurately to coincide with an irregular surface. The skirting is "scribed" to fit the floor.

SECRET GUTTER. A small lead or zinc gutter out of sight, partly under the edge of the slates or tiles of a roof at the junction of the cheeks of a dormer with the roof or a chimney stack, turret, or other erection rising above the roof slope.

SECTION. The representation of any solid from which a portion has been removed, owing to its intersection by a plane. This is so contrived as to show its internal details and construction.

SET-OFF. *See* OFF-SET.

SETTING-COAT. The finishing coat of plastering. Setting stone is the fixing of masonry.

SHAFT. The part between the cap and the base of a column or pillar. A well or vertical sinking. A tall, disengaged chimney.

SHAKES. Fissures or cracks in timber, due to imperfect contraction or lack of seasoning. Big balks of timber commonly develop shakes, which may be unavoidable, and only experience can form a correct opinion in regard thereto.

SHINGLE. Coarse sand mixed with small pebbles. Shingles are wood roofing slabs.

SHOE. The bottom of a rain-water pipe, turned outwards to direct the water from the building. Also a metal base to a column or post, or pile or strut.

SIJORES. Raking struts, used to prop up a building.

SILL. The bottom plate of a partition or frame. The sill of a window frame is generally of oak, or, better still, of teak. *See* CILL.

SKEW-BACK. The sloping abutment from which an arch springs.

SKIRTING. The plain or moulded boarding placed round apartments.

SLAKED LIME. Lime which has been quenched or hydrated with water, or by exposure to the atmosphere.

SLEEPER-WALL. A dwarf wall under floor-joists.

SLOW COMBUSTION GRATE. A grate in which the draught through the fire from below is minimised, and fire-lumps are used for the sides and back, so as to reduce the metal to a minimum, sometimes called a "Parson's Grate." *See* TEALE GRATE and WELL FIRE.

- SOFFIT.** The underside of any horizontal surface or projecting member, landing, or stair.
- SOLE PIECE.** The bottom piece of timber erections, such as the cill which takes the raking strut of a gatepost. "Sole piece" may be synonymous with "cill."
- SOOT-DOOR.** An iron door in an aperture in a flue, for the purpose of cleaning it.
- SOUND BOARDING.** Rough boarding, carried on fillets attached to the floor-joints, and used to receive pugging to deaden sound. See **PUGGING**.
- SPAN.** The clear bearing of a roof or beam.
- SPANDRIL.** The triangular space formed between the haunches of arches and the architrave, or on either side of arches enclosed in square panels.
- SPECIFICATION.** The description in writing of the various works to be done under a building contract or otherwise.
- SPLAY.** To slant off or cut away the edge, in order to make a slope or level.
- SPRING BLINDS.** Roller blinds, actuated by a spiral spring set in the tube on which the blind rolls up, the action being regulated by a rack and cogged arrangement, set free by pulling a cord.
- SPRINGING.** The level from which an arch takes its rise, and its radius is struck or turned.
- SQUARE-FRAMING.** The simplest kind of panelling.
- STANCHION.** An upright post or support. Without any qualification, the word implies an iron support.
- STILES, or STYLES.** The vertical timbers of framing. Thus in a door, the side to which the hinges are attached is termed the hanging style.
- STOPPING.** The filling in of crevices, cracks in plastered walling, or filling in defects with white lead or putty in woodwork, previous to painting.
- STORY-POST.** A vertical timber or iron stanchion, placed under bresssummers.
- STRAIN.** The deformation or altered condition of a body as the result of a stress. Breaking strain where actual rupture occurs.
- STRAINING BEAM.** A strut placed between the heads of queen-posts in roof-trusses.
- STRAINING SILL.** A similar timber at the feet of the queens.
- STRAP.** An iron tie to retain timbers in the position they should occupy in trusses.
- STRAP WORK.** A method of ornamentation composed of an ingenious contrivance, and interlacing, or folding of bands peculiar to the Elizabethan period in England, or in Moorish work as in Spain.
- STRETCHERS.** Bricks or stones lying in the direction of their greatest length towards the face of the wall.
- STRICKLE.** The metal profile used for running mouldings.
- STRIKE.** To dress and finish off a joint with a trowel in masonry or brickwork. Struck joints are usually weathered.
- STRIKING.** The operation of removing the centres from arches and bridges.
- STRING-COURSE.** A band of mouldings or ornament, or a plain face which projects slightly from the wall, generally used to mark the divisions of stories.

STUCCO. Lime or cement mortar applied to wall surfaces when wet, but drying hard and durable. It is a very old method of external treatment, and in bastard stucco, or three-coat work, done in good lime, is very permanent and weather-resisting, and gives a pleasant, warm colour which is lasting. It can be ornamented, modelled, and moulded. Stucco also keeps out the wet from thin walls. *See GRAFFITO.*

STUD. *See* PARTITION.

SURBASE. A moulding above the dado surrounding a room; the group of mouldings forming the crowning member of a plinth or base course.

SYPHON TRAP. A bent **S**-shaped pipe to prevent the passage of foul gas in drains.

TABLE MOULDING. The hood moulding in Gothic architecture.

TAILING. The distance a stone or beam is inserted into a wall.

TEALE GRATE. A slow-combustion grate in which, by disposing the fire-lumps at particular angles, the heat is economised and thrown into the room. The grid of the grate is very fine, and vertical bars are employed in front of the grate. This is one of the most scientific grates made, and has stood the test of several years' use. It was not patented. The inventor gave his idea to the world without any financial gain to himself.

TEMPLET, or TEMPLATE. A mould or pattern cut to the exact form to which work has to be executed; also a bed of stone placed under a beam.

TENON. A tongue of timber made to fit into a cavity, or mortise in another timber to form a joint. *See* MORTISE.

TENSION. The longitudinal strain in which materials serving as ties in building are exposed in the direction of the fibres of the material employed.

TERRA-COTTA. A superior kind of brick or clayware partaking of the nature of masonry. Terra-cotta signifies "baked clay." When glazed the material is termed "faïence."

TERRAS, or TRASS. A Dutch substitute for Pozzolano.

TESTING DRAINS. This is a process to discover leaks of gas or water in tube drainage. The water test, by filling each branch separately by filling with water, is the most reliable, and locates the defects. Smoke tests and chemical tests are less likely to strain the joints of the drain, and are more easily applied. The water test is really most suitable for testing new work, and no drain should be passed without such testing.

TIE-BEAM, or TIE-ROD. The wood beam at the foot of a truss or principal, or the iron rod used in its place.

TOBIN TUBE VENTILATORS. Inlets for fresh air with a valved outlet into a room set some six to seven feet from the floors, and connected at their base with the external air, usually $4\frac{1}{2}$ by $4\frac{1}{2}$ inches square.

TONGUE. A thin ledge or shoulder worked on the side of a board, or a detached slip made to fit into a corresponding groove wrought in the adjacent board into which the tongue is inserted, constituting a grooved and tongued joint. *See* CROSS-TONGUED.

TOOTHINGS. The notchings or rough ends of brickwork or masonry left in a wall, to which subsequent additions have to be made.

TORUS. A semicircular projecting moulding in the base of a column.

TRANSOM. A horizontal bar across a window, or placed in a door frame below a fanlight.

TREAD. The horizontal face of a step.

TREFOIL. An ornament or opening, as in tracery, which takes the place of the trefoil or three-leaved clover. A "trefoil arch" is the arch of three centres.

TRIMMER. A short joist or support at right angles with the floor joists. It bears on the wall and on the trimming joist, or on two trimming joists, and is used where voids occur, and to provide for special openings in floors. A brick trimmer is a shallow arch in thin brickwork built out from the breast of the fireplace to the trimmer to support the hearth. See BACK TRIMMER.

TRUE. A common word frequently used to indicate that pieces of work or materials are executed, set or fixed correctly, and maintain their workmanlike exactitude; contour or shape.

TRUSS. A framed support of timber-work, specially calculated to carry a load. A trussel partition is one designed to bear only on the walls at each end, and to take the load of the void by diminishing or equalising the thrust.

TUCK POINTING. A parallel and straight-edged joint added in fine plaster or cement, to give a surface joint to brickwork or masonry. Commonly used to disguise inferior jointing, and very liable to break away and perish from the action of frost. A method of pointing not to be recommended.

TURNING-PIECE. A solid centre, used with flat arches of small span.

TYMPANUM. The triangular space within a pediment. See PEDIMENT.

UNDERPINNING. The cutting out of bad or insufficient foundations and the insertion of brickwork or concrete down to a good bottom, in order to insure a firm and substantial foundation. The process is best done in sections of short lengths, the inter-spaces being filled in as the work proceeds, and sometimes timber posts and shoring have to be employed.

URALITE. A recent and new material, made of asbestos, in sheets 3 feet wide and one-eighth of an inch thick; a good non-conductor, very useful, readily cut like wood, and fixed by copper nailing. It can be waterproofed, and used for roof and wall coverings externally.

VALLEY. The internal angle formed by the intersection of two inclined sides of roofing.

VALLEY TILE. A specially made tile for valleys.

VAULTING. The arched roofing in masonry.

VENEER. Thin layers of costly wood or marble placed over a more common material.

VENETIAN WINDOW. A three-light window, with the middle light broader than the side ones, the divisions being solid piers, the height being the same throughout.

VERGE BOARDING. The ornamental perforated woodwork or large boarding used to decorate a gable end of a roof or the bottom edge of a projecting story in half timber building.

VERMICULATED WORK. The surface of stone tooled to give projections having a waving appearance of worm-like irregularity of surface, and used in rusticated masonry.

VOLUTE. The scroll of a classic capital.

VOUSSOIRS. The wedge-like shaped stones forming an arch in masonry.

WAINSCOTTING. Panelled work of wood covering of walls, and mostly employed to designate oak work of this nature.

WALL-PLATE. The wooden beam on which the roof-truss has its bearing.

WASHER. A metal plate placed under a nut to increase the area of bearing.

WASTE. Spoiled material or cut to waste. A leaden pipe to convey water from a sink or bath to a drain, from which it is commonly disconnected by emptying into the open air over a water-head.

WATER-WASTE PREVENTER. A small cistern fitted with a ball-valve stop-cock, and containing usually from two to three gallons, to discharge a given quantity of water into wash-out water-closets at a rapid flush.

WEATHERED. The upper surface sloped on all exposed parts, projecting or otherwise, in masonry or joinery, from the centre or inner side to the outer, in order to discharge the rain-water as it falls upon the surface. Projections beyond the face of the work below are necessary, and a drip also is required to prevent the water from running down the surface below.

WEATHER BOARDING. Feather-edged boarding fixed vertically on quartering.

WEATHER TILING. Tiling employed in a vertical position on walls or gables.

WELL-FIRE. A fireplace having the fire sunk below the level of the hearth. Combustion is thus retarded and consumption is more complete. Special care is needed to protect timbers from the heat of the hearth, which becomes very great.

WELL-HOLE. The central hollow in a winding or open staircase.

WINDERS. Steps made of wedge-shape on plan, to turn round corners in a staircase.

WITHE. The thin divisional wall in a chimney, serving as a partition between adjoining flues.

WOOD-BLOCK FLOORING. Paving in wooden blocks, mostly interlocking in section, and laid upon concrete in a bed of bitumen or of asphalt. In the cheaper work tar setting is used. Maple, pine, and oak are the woods mostly employed, and the work varies in thickness and price and much in quality.

WOOD BRICK. A small block of wood built into the interior face of a wall to serve as an attachment for woodwork nailed to the same. *See BREEZE BRICKS.*

WOOD PLATE. A beam of timber placed under joists or rafters to equalise the bearing.

WOOD PLUG. A wooden wedge driven into walls to give a hold to nails or screws.

WREATHED COLUMNS. Pillars twisted in section of surface in spiral lines.

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[*The italics refer to the Precedents.*]

THE END.

EMDEN'S BUILDING CONTRACTS.

[FOURTH EDITION.]

SUPPLEMENT

COMPRISING REFERENCES TO ALL IMPORTANT CASES
DECIDED SINCE OCTOBER, 1906 (INCLUDING
SEVERAL UNREPORTED CASES).

BY

W. VALENTINE BALL, M.A.,

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THE 4TH EDITION, AUTHOR OF "THE LAW APPLICABLE TO ENGINEERS," ETC.

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PRELIMINARY NOTE.

WHILE this Supplement was in preparation the public and the profession were grieved to learn of the death of His Honour Judge Emden, the author of the First Edition of this work.

The object of this Supplement is to supply the lawyer with suitable references to all the important cases relating to building contracts which have been decided since the last edition. With regard to decisions which are reported in law reports, it has been found impossible, owing to limitations of space, to give much more than a bare reference. The writer, however, has endeavoured to deal at greater length with certain cases tried since 1906, which have not been included in the regular reports. Amongst these are *Horton v. Hodges* (p. 71), *Stevens v. Moses & Davis* (p. 188), *Freeman v. Middleton Electric Traction Co.* (p. 383). These decisions appear to be of great importance to the building world. One other case, namely *Attock's Trustees v. Bridge R.D.C.* (p. 385), not yet reported, will appear shortly in the *Justice of the Peace*. Care has been taken to procure extracts from the shorthand notes of the judgments, so that the passages quoted in the Supplement may be declared to be authentic.

W. V. B.

EMDEN'S BUILDING CONTRACTS.

ACCURACY NOT WARRANTED.

Page 17, note 31. A clause which draws attention to this limitation of liability is generally inserted in the agreement; but it only protects the building owners from the honest mistake of themselves or their agents. In a contract to construct certain sewage works the plaintiffs covenanted to do the works described in the drawings and specifications according to the drawings, etc., and the defendants covenanted to pay for the works on the receipt of the certificate in writing of their engineer, as provided by the conditions. The specification provided *inter alia* that the plaintiffs must verify all representations, and not rely upon their accuracy. On completion, the plaintiffs claimed £6,574 from the defendants on the ground—first that the plans showed a certain existing wall extending nine feet below the ordnance datum line, which could be used for the purpose of the works; that this wall did not exist, and that consequently the plans for the works had been altered, and the plaintiffs, at the direction of the engineer, had completed the works at the extra cost. It was also alleged that the defendants had fraudulently misrepresented the structure and existence of this wall, and had thereby induced the plaintiffs to enter into the contract to their detriment. The defendants relied on the absence of a certificate from their engineer, and on the conditions of the specification, and they denied the making of any representation and any fraud. It was held that the specification only protected the defendants in respect of honest mistakes by themselves or their agents, and that it was for the jury to say whether there was fraud. (*Thames & Middlesex Corporation*, 1907 A.C. 157, 1907 2 Ir. R. 507.)

Page 20, line 21. See £826 and £120.

ACCEPTANCE OF A TENDER.

Note 11. (*How v. Ford* (supra)) was followed in *South J. Land Co. v. Portland Trust Co.* (1910), 26 T. L. R. 531.

ACCEPTANCE OF TENDER BY LOCAL AUTHORITY.

Page 22, note line 10. A local authority not accepting the lowest tender cannot be compelled to do so. (*H. v. Roberts*) (1907), 26 T. L. R. 491.)

BOARD OF APPOINTING OR MAKING TENDERS.

Page 25, after line 5. With regard to the plans and conditions which are produced to the contractor who is asked to tender two ordinary rules of law apply, namely, that if there is any misrepresentation made, the tenderer acting on that misrepresentation is not liable. Thus in *Moss & Co. v. Lill v. Smeaton* (1910), 74 J. P. 351,

the plaintiffs, a firm of contractors, sent in a tender which was accepted. Upon their attending to examine the drawings, specifications, and general conditions, the assistant engineer of the defendants, in answer to a question, said the conditions were ordinary conditions. The defendants upon subsequently reading the conditions found that they were unusual, and refused to go on with the contract. They were held to be entitled to do this and to recover a sum of £101 1s. which they had paid as a deposit. . . .

PAROL EVIDENCE WHEN CONTRACTS ARE IN WRITING.

Page 33, after note (o). See also as to parol evidence when contracts are in writing, *Formby v. Formby*, [1910] W. N. 48; 162 L. T. 116; 54 Sol. Jo. 269, in which it was held that where a contract in writing for the erection of houses is entered into between a builder and a person who is described throughout as, and signs himself "proprietor," parol evidence is not admissible to show that, in fact, he is merely agent for another, although he may be a "man of straw."

Page 44, add to note (p). *Lawford v. Billericay R. D. C.* was followed in *Bourne v. Marylebone Borough Council*, [1908] W. N. 52; 72 J. P. 306; 24 T. L. R. 613; 6 L. G. R. 1141.

CONTRACT UNDER SEAL.

Page 45, after note (u). *Williams v. Barmouth U. D. C.* was followed in *Hunt v. Acton Urban District Council* (1907), 72 J. P. 345; 6 L. G. R. 957.

ARCHITECT SUING ON A *QUANTUM MERUIT*.

Page 71, after note (j). As to recovery of an architect on a *quantum meruit* for work which he has done for a local authority under an unsealed contract, see *Hodge v. Matlock Bath U. C.* (1910), 74 J. P. 374; 26 T. L. R. 617 (on appeal, where appeal dismissed on terms); 8 L. G. R. 1127.

DISMISSAL OF ARCHITECT.

Page 71, after note (e). In *Horton v. Hemsley* (*Times*, February 16, 1908), Mr. Muir Mackenzie had to consider the position of an architect whose employment was terminated before a building estimated to cost £122,000 was completed. The architect sought remuneration according to the prescribed scale (as to which see p. 72, *post*). In giving judgment, the Official Referee said: "If, after part performance of his work by an architect, the employer refuses to continue the contract of employment, the architect can recover for all sums due for services rendered before refusal, and for what he has lost by not being permitted to complete the contract of employment; or he may treat the contract as rescinded and recover the value of the services he has rendered." It may be mentioned that in that case the Official Referee refused to adopt the scale, but allowed the architect to have 3½ per cent. on £90,000. The figure £120,000 did not apply, as the building owners had power to make alterations which would reduce the cost.

DUTY TO SUPERVISE WORKS.

Page 78, after note (c). Dry rot has also been a source of trouble to architects in certain English cases, see e.g., *Grove v. Judge* (1909), L. T. Jo., Feb. 13, p. 333; *Shoolbred v. Wyles and Migotti*, *Times*, Oct. 15, 1909; *Leicester*

Goodwin v. Telling (1911) 71 L. P. 107. In this case a firm of which the defendant was the sole surviving partner was employed in accordance with a term of agreement that a clerk of the works should be employed. Four years after the work was completed, dry rot broke out in floors and walls, concrete, a large area of which was laid on the ground floor of the new building. It was alleged that this defect arose owing to the negligence of the defendant in not seeing that the concrete was properly laid in accordance with the contract. It was also alleged that in correspondence which passed between the parties after the dispute arose, the defendant, in consideration of the corporation, refraining from suing, undertook to put the work right at his own expense. The defendant denied that it was his duty to supervise the laying of the concrete, and alleged that it was the duty of the clerk of the works. He counterclaimed for damages, alleged to have been occasioned by the plaintiff having in breach of its implied contract appointed an incompetent clerk of the works. It was held that while the duty of a clerk of the works under an ordinary building contract is to supervise the doing of the work, the laying of the concrete in this could not be regarded as a detail, and that the architect was liable.

NEGLIGENCE OF ARCHITECT.

Page 79, after note (1). In *Knox v. Hall* and reported in the *Times*, June 8, 1910, a claim was made by a picture dealer against his architect and a builder for negligence in the construction of a picture gallery. It was alleged that provisions should be made in the walls for an air draught or other means of ventilation to dry and keep dry the walls so as to prevent the picture from becoming damp and moulded. The jury found that the architect had been guilty of negligence, and damages were awarded to the building owner.

ARCHITECT AS ARBITRATOR.

Page 80, after note (1). The duty laid as to the duty of an architect acting as arbitrator between workmen and employers should be considered. See also the alleged duty of an architect acting as arbitrator, *Atties and Orr v. Allen's Trustees* (1910), 17 S. L. R. 249, and *Household and Ins.*, p. 192, *infra*.

Page 80, note (3), last line but one, for 1 L. C. 221 read 5 C. P. 221.

DEMANDS BETWEEN ARCHITECT AND BUILDER.

Page 80, after note (3). *Shelford v. Rogers & Co.* was dismissed in *Noble's Trusts v. Shelford & Rogers* (1909) 2 C. 671-73 L. J. C. 798, 22 T. L. R. 724, where Noyes J. expressed the view that a claim might be covered from a demand for payment.

ATTENTION OF ARCHITECT.

Page 80, after note (3). It was held in *Southall* that where a builder contracted to construct a garage, the architect had no authority to construct the gate of a wall. *Southall v. Young* (1907) 8 C. 383.

Page 80, note (3), for (1905) read (1906).

Page 80, note (3), last 2, for 182 read 121.

ACTING WITHOUT AUTHORITY.

Page 81, after note (1). *Green v. Wright* was affirmed in *Young v. Tynan* (1910) 1 K. R. 210, 79 L. J. K. R. 388, 102 L. T. 57, 26 T. L. R. 211.

CONDUCT OF ARCHITECT IN RELATION TO CERTIFICATE.

Page 102, add note (*m*). The conduct of an architect in relation to a certificate and his duties generally must now be considered in the light of the case of *Blackwell & Co. v. Mayor, etc., of Derby* (1909), 75 J. P. 129. R. Blackwell & Co. had contracted to do certain tramway work for the Derby Corporation. A certificate was given by the engineer of the Corporation, but a sum of £1500 had been deducted under a penalty clause in respect of delay. Blackwell & Co. objected to this penalty on the ground that the delay was really caused by the Corporation, through their engineer, in not allowing proper facilities for proceeding with the work. The contention of the company was that the borough surveyor, who was appointed engineer under the contract, acted improperly and unfairly towards them. He did not, according to their view, distinguish between the duties of an impartial engineer under the contract and what he would like to do as borough surveyor. The contract contained a very wide arbitration clause providing that all differences should be referred to the engineer. The company brought an action against the Corporation. The Corporation took out a summons to stay, on the ground that the dispute must be decided by arbitration. It was contended that to allow the matter to proceed to arbitration would really be to allow the engineer to be the judge in his own cause, as his conduct was to be called in question, and it was pointed out that this case differed from all other reported cases in this respect—namely, that the engineer would have to be a witness on the other side.

The Court of Appeal held that the company were entitled to have the decision of the Court. Fletcher Moulton, L.J., said: "Each case must be decided on its facts, and in my opinion, where the nature of the dispute arising from facts which were subsequent to the contract is such that we are of opinion that the tribunal is not likely to be able impartially to deal with the dispute, it is open to us, and it would usually be the duty of the Court, to refuse to enforce the arbitration clause. . . . Corporations are, in my opinion, often too fond of putting officers of theirs in the position of engineers under a contract, and they forget that, as they are performing other duties to the Corporation, there may arise a conflict between their duties in these other offices and their duties as engineers under the contract, which may give rise to unfair treatment to the contractor by reason of the zeal with which officers perform their other duties." Buckley, L.J., said: "The fact that the Referee was the officer of the Corporation was not sufficient ground, but the point here is that the contractor's case—whether true or not is a matter to be determined—is this: I could not complete my contract in time, and the reason why I could not complete it in time was that you, the contractual referee, were an unreasonable person; you hindered me in every conceivable way; you would not let me deposit any material in such a way as it is usual to allow me to deposit my material—in advance of my work—you placed all sorts of impediments in my way. . . . How could you expect him to say, if he is a person of any character at all, that the acts which he did were unreasonable acts? It is not human nature to suppose that he can properly determine that he himself is an unreasonable person. That is the subject matter of the dispute. . . . I think that there is sufficient reason why the matter should not be referred, being such as this is, to this particular gentleman." See also *Freeman & Sons v. Chester le Street R. D. C.*, [1911] 1 K. B. 788; 75 J. P. 132.

EFFECT OF LARGE ORDERS FOR EXTRAS.

Page 149, after note (c). In *Bell v. Brullington Corporation* (1908), 72 L. P. 453, although many alterations and extras were ordered by the engineer, the contractors unsuccessfully claimed to abandon the original contract and to be paid by *quantum meruit*.

OPERATION OF PENALTY CLAUSE.

Page 149, after note (c). Where the contractor owing to circumstances over which he has no control, is unable to commence his work until after the time mentioned for completion, *Hell v. Guppy* is an authority for the proposition that the penalty clause does not run. In *Frederick v. Stevens* (1910), 20 Ont. L. R. 331, it was held following *Hell v. Guppy* that the clause providing a penalty of \$1 a day for delay was applicable to the specific period only; and did not apply to delay after the period had expired. There was in effect a new contract for the performance of the work at the contract price, but the penalty clause was not revived and made applicable to delay in the after prosecution of the work. For such delay the plaintiff might be liable, but only on proof of damage thereby sustained.

WAIVER OF CLAUSE AS TO EXTRAS.

Page 184, after note (d). See also *Jackson v. Renford R. D. Co.* (1909), 73 L. P. 248. In that case the plaintiff contracted to carry out sewerage works for the defendant council. In consequence of orders, the work was varied and rendered much more expensive. The plaintiff claimed to be entitled to payment on a *quantum meruit* based on the cost and value of the work. It was held that he was only entitled to be paid on the basis of the contract price plus extras. The engineer had given no final certificate, and many of the extras were not ordered in writing, but the defendants had withdrawn their plea of no certificate, and the plaintiff had withdrawn a charge of misconduct against the engineer. It was held that upon this state of the pleadings, the referee would deal with the extras on their merits.

IMPLIED AUTHORITY OF ARCHITECT AS TO EXTRAS.

Page 188, after note (c). An agreement to do work to the satisfaction of an architect impliedly gives him authority to order extras (*Robertson v. Jones* (1910), 45 S. L. R. 206), and it is also important to note that the power of the architect with regard to extras are very much wider if the contract enabled him to say the work was to be done by the contractor. In *Stevens v. Moss & Dixon* (Court of Appeal, 1910, 7, 1910), Lord Justice Maughan pointed out that in *R. v. Jones* (supra) there was no power to vary. In *Stevens v. Moss & Dixon* the plaintiff had contracted with a firm of builders, who were erecting a building, to install an extensive well to supply the building with water. Under his contract the plaintiff was to sink the well to a depth of 550 feet, but when the work was being carried out, the boring tube broke at a considerable depth below the surface. It was then found impossible, but fortunately it was found to be unnecessary, to continue the boring, for by means of an air lift pump sufficient water could be raised. The use of an air lift pump being deemed proper by the building officers, an order was given to the plaintiff by the

defendants, who were architects to the builders, to put in the air lift pump. Having so put it in, he sought to make the architects personally liable on the contract, but it was held that he could not do so. Dealing with the case of *Rex v. Peto* (*supra*), Lord Justice Fletcher Moulton pointed out that there was no power to alter or vary, but there was only a power to direct extra work and direct omissions. Accordingly, the judges in that case said that the finding of the jury that the clerk of the works directed the builder to vary the piling was not in accordance with the strict language of the bond, and that he "must, in a plea of performance, *quoad* such parts in which no orders were given by the surveyor to vary and deviate from the original plan, show an authority in the surveyor to give such directions, or aver that, the deviation or variation was an omission or addition." Lord Justice Moulton then said: "It was based on the fact that the word 'vary' was not there. If the word 'vary' had been there, the alterations in the mode of piling would probably have been covered by it, but the Court said 'You have neither proved authority, because it is not within the condition of the bond, nor have you even averred that the variation was in the nature of an addition or omission so as to bring it within the meaning of the language of the bond.' Therefore I cannot see what other conclusion they could have come to. They decided that *non obstante veredicto* the Crown were entitled to succeed. It was a decision, certainly, that in the absence of the word 'vary' you must prove that this change may be fairly considered to be an addition or an omission, and if you cannot do that you fail, but it is no decision as to what the powers of an architect are when there is express power to vary. Now, I quite agree that 'vary' means not so as to destroy the scheme of the whole thing, but, in my opinion, to substitute for one well-known piece of machinery an equivalent, equally well known, doing exactly the same work—certainly a different one, just in the same way as if you had ordered a Dean pump, and then you made up your mind subsequently to use another pump. In my opinion, I am satisfied that this is within the language of the word 'vary,' and I am still further satisfied that the case of *Rex v. Peto* has nothing whatever to do with this case, and I think I may say has nothing to do with any modern contract of this kind in which a power to vary is almost always expressly given." (The above extract from the judgment is taken from the transcript of the shorthand note, which is in the author's possession.)

IMPLIED ORDER BY EMPLOYER.

Page 188, after note (*e*). In a recent case, an employer insisted upon the execution of certain works which he alleged were included in the contract, but the contractor maintained that they were extras. No order in writing was given for the execution of these works. It was held that, in these circumstances, an arbitrator was justified in enforcing an implied promise by the employer to pay for the works either as included in the contract price or as extras. (*Molloy v. Liebe* (1910), 102 L. T. 616.)

LIABILITY OF EMPLOYERS.

Page 208, after note (*r*). See also *Odell v. Cleveland House, Ltd.* (1910), 26 T. L. R. 410; 102 L. T. 602, where for the purpose of demolishing the upper part of a building, the owners, who had employed an independent contractor, were nevertheless held liable to the ground tenant for damages for not having taken the precautions they might have done to prevent the mischief. Parties may,

of power, contract out of the act. For a form of clause imposing liability on a builder which was held to be effective, see *Congham B. B. Co. v. Sutton District Water Co.* (1908, 71 J. P. 513, 6 L. G. R. 259) and 72 J. P. 217, 6 L. G. R. 574.

Page 210, after note (c). An under lease is not an "assignment" of the lease (the original lease) so as to be entitled to the benefit of a protective covenant entered into with the latter "lessors, lessors, administrators, and assigns" by the original landlord on the original lease. (*Sutton v. English Docks, Ltd.*, 5, Fisher, (1906, 2 Ch. 631, 75 L. J. K. B. 78) 96 L. T. 48.)

Page 217, after note (d). *Indemnity Insurance* was distinguished in *Pharmax v. Biddle*, (1908, 2 Ch. 665.)

Page 227, after note (p). See also *London v. Humber*, (1903, 2 Ch. 252) 101 L. T. 292, 78 L. J. Ch. 741; 25 T. L. R. 649, where the *case of Hall v. Bryant* (supra) was overruled.

Page 231, note (v). In *Knox v. Tully*, (1905, 1 Ch. 480, which was overruled while this work was in the press, the decision of the Court of Appeal has been affirmed, the House of Lords being equally divided. See (1907, A. C. 1.)

Page 232, after note (d). As to what is a sufficient agreement in writing, see *Hunter v. The New Forest*, (1908, 1 Ch. 107, 77 L. J. Ch. 134, 98 L. T. 478.)

Page 233, after note (p). *Leitch v. A. G. G. & Co.*, (1908, 1 K. L. 29, 77 L. J. K. B. 27, 98 L. T. 360.)

Page 234, after note (y). Followed in *Boag v. Boag*, (1907, A. C. 42; 76 L. J. Ch. 690, 97 L. T. 591.)

Page 239, after note (f). See *Leach v. Trevellick*, (1908, 1 Ch. 630, 98 L. T. 589, 24 T. L. R. 399.)

THE TRINITY.

Page 271. The Electric Lighting Act, 1900 (9 Ed. 7, c. 34), the text of which is set out for convenience, the relevant provisions. In the interpretation of word for generating stations, supply in bulk, supply outside the area, and payment of power, and provision constituting a undertaking from participating with electricity undertakers.

Page 248, after note (y). The statutory powers of the Electricity Commission with the subject of increased charges of the undertakers, for the power of the consumer's purchase. (*Edinburgh v. London Corporation*, (1910, 2 Ch. 254, 80 L. J. Ch. 21, 100 L. T. 214, 74 L. T. 380, 26 T. L. R. 468.)

PATENT RIGHTS OF INVENTORS.

Page 361, after note (f), Electric Lighting Act, 1900 (9 Ed. 7, c. 34, s. 23.)

MOTION OF THE APPOINTMENT.

Page 393, after note (y). The appointment of an arbitrator does not confer upon him the right to delegate the duty of appointing arbitrators to a sub-committee.

In *Pharmax v. Biddle*, (1908, 2 Ch. 665), *Pharmax v. Biddle*, (1908, 2 Ch. 665), the plaintiff had agreed to do certain engineering work for the defendant company. The work was to be done to the approval of, and certificate was to be granted by, the engineer, "Stephen Sutton, Esq., C.E., or other appointed by him." Dispute having arisen, the plaintiff said his certificate was alleged to be the order of the contract in respect of which they relied upon the certificate appointed by him. They alleged in the first instance that Stephen Sutton, the engineer under the contract, appointed

J. Angus as permanent resident engineer on the works, "to act as engineer under the contract, to give orders for additional works in writing, or in the alternative (that he) was held out by the defendants as so appointed." Hamilton, J., in dealing with this point, said: "There is no evidence to satisfy me that Mr. Angus was in fact the engineer to give orders in writing. It is perfectly clear that both parties were entitled to the opinion, the certificate, the judgment, and the decision of Mr. Sellon; either party would have been entitled to object, and I have no doubt, if the matter had arisen, would have objected to having put upon them, instead of Mr. Sellon whom they did know, Mr. Angus whom Mr. Sellon knew, and they very likely did not . . . Under the terms of the contract, Mr. Sellon had no authority or power to appoint or depute his functions to Mr. Angus. Mr. Angus clearly derived his authority only from the appointment of Mr. Sellon, which the company had notice of and did not object to. . . . Mr. Angus was, in fact, never anything but what it is admitted that he was, and what he is called, namely the permanent resident who acted for Mr. Sellon, and was closely supervised by him." Eventually it was held that, upon the facts above stated, Angus had no authority to grant certificates.

(NOTE.—This case not being reported, the above extract from the judgment has been obtained from the shorthand note.)

Page 384. Add as a note to clause 12. As to the effect of giving the architect power to *vary* the work, see *Stevens v. Meves & Davis*, note *ante*, *sub tit.*, p. 188.

Page 385, cl. 16. In *Adcock's Trustee v. The Bridge Rural District Council* (1911), 75 J. P. (see preliminary note), Phillimore, J., made the following observations upon this and the following clause: "Happily in this case I think I have not to definitely construe clause 16, but it occurs to me that the real business-like way to construe it is to apply it to emergencies, to things that arise in the immediate course of building which require rather executive than judicial action, or judicial action followed immediately by the judge carrying out his judgment. If a stack of bricks are bad bricks in the sight of the architect for the class of work which is going to be done, and he rejects it; if there is a piece of 'green' work built, the architect or clerk of the works may say, 'That is badly done and must be pulled down and rebuilt.' But when an architect has looked at the work on one of these visits and has not condemned it, and the contractor has obviously treated it as finished and taken his men off from it and proceeded to some other piece of work, it occurs to me that clause 16 ought no longer to apply. If, in fact, the work is badly done, and mischief follows in consequence, the architect is not without his power, and the employer is not without his protection. The architect then uses clause 17, and applies the retention money, and in that case he is no longer acting on an emergency. He is acting judicially, and only judicially, and there is the appeal from him to the arbitrator. That seems to me, if and so far as I have to decide it in this case, to be the way of reconciling clauses 16 and 17."

Page 388, note to cl. 26. As to the right of a builder to enforce his lien, see *Byford v. Russell*, [1907] 2 K. B. 522; 76 L. J. K. B. 744; 97 L. T. 104.

Page 389, note to cl. 27. In *Crittall v. L.C.C.* (1910), 75 J. P. 203, Channell, J., had to consider whether the persons providing a prime cost or provisional item were enabled to sue the building owner. In giving judgment (holding in the circumstances of the case that the building owner was liable), he said:

"In the case of these provisional items, however, it does seem that the contract made to procure them is in point of fact a contract in which the building owner is the real principal, because if it is a good contract, he gets the benefit of it; if it is a bad contract he suffers the loss. He is the person who is interested. The builder is not in the least interested. He gets no more if it is a good contract and no less if it is a bad one. . . . In my view the effect of this clause as to provisional items which are very common in contracts is generally to make the building owner a real principal upon the contract under which these things are ultimately supplied. I am not sure that it would be so in all cases, because it would depend on the way in which the articles are supplied."

ARBITRATION CLAUSE.

Page 280, after note (c). The arbitrator to whom "all questions now at issue" are submitted under a clause such as this, will apparently discharge his duty by awarding a lump sum. He is not bound to answer specific questions. (*Mason and Orr v. Allan's Trustees* (1910), 47 S. L. R. 203.)

MEANING OF "HEIGHT."

Page 479, after para. (2D). Even when there are stories in the gable, it is to be excluded: *Att.-Gen. v. M'Call* (1903), 70 J. P. 17, 91 L. T. 612; 4 L. G. R. 166.

MEANING OF "ADJOINING OWNER."

Page 480, after note (b). It means every person holding an interest in the adjoining premises other than tenants from year to year or at will, so that a statutory notice under s. 139 must be served on every such person: *Crosby v. Alhambra Co.*, 1907 1 Ch. 295; 76 L. J. Ch. 176.

Page 482, after note (c). *L.C.C. v. Hancock and Jones*, 1907 2 K. B. 45; 76 L. J. K. B. 526; 71 J. P. 268, 96 L. T. 618, 23 T. L. R. 417.

DECISION OF SUPERINTENDING ARCHITECT.

Page 493, after note (f). As to finality of the superintending architect's certificate, see *Lalley and Skinner v. L.C.C.*, 1910 A. C. 1; 79 L. J. K. B. 202; 100 L. T. 709, 73 J. P. 297, 7 L. G. R. 675; 53 S. J. 429.

MEANING OF "OPEN SPACES."

Page 493, after sect. 41 (1), (11). See also as to open spaces, *A.G. v. Friary Brewery* (1907), 23 T. L. R. 487, 71 J. P. 348, 5 L. G. R. 697.

MEANING OF "HEIGHT."

Page 492, after note (d). *Att.-Gen. v. M'Call*, 1903 1 Ch. 827, 77 L. J. Ch. 261, 97 L. T. 747, 72 J. P. 97, 21 T. L. R. 53.

WHAT IS SUFFICIENT NOTICE.

Page 517, after note (a). Where a class of persons such as joint tenants or tenants in common are entitled to a particular interest in the adjoining premises, notice

on one of such class will be sufficient. (*Crosby v. Alhambra Co.*, [1907] 1 Ch. 295; 76 L. J. Ch. 176, discussing *List v. Tharp (supra)*.)

Page 523, after note (d). The words, "The building owner at whose expense the same was built" mean the building owner or his assigns as the case may be. (*Mason v. Fulham Corporation*, [1910] 1 K. B. 631; 79 L. J. K. B. 385; 102 L. T. 188; 74 J. P. 170; 8 L. G. R. 415.)

MEANING OF "BUILDING OR STRUCTURE."

Page 528, after note (u). A reservoir authorised by special act is a "building or structure" within the meaning of this section, in respect of the supervision of which the surveyor is entitled to fees: *Moran & Sons v. Marsland*, [1909] 1 K. B. 744; 78 L. J. K. B. 346; 100 L. T. 374; 73 J. P. 114; 7 L. G. R. 493; 25 T. L. R. 235; so is a school constructed by the London County Council in accordance with the regulations of the Board of Education. (*L. C. C. v. District Surveyors' Association*, [1909] 2 K. B. 138; 78 L. J. K. B. 729; 100 L. T. 890; 73 J. P. 291; 7 L. G. R. 569; 25 T. L. R. 463; *Galbraith v. Dicksee* (1910), 102 L. T. 890; 74 J. P. 348; 8 L. G. R. 800.)

Page 529, after *Charing Cross Co. v. Woodthorpe* in note (d). This was followed in *County of London Electric Supply Co. v. Perkins* (1908), 98 L. T. 870; 72 J. P. 138; 6 L. G. R. 344; 24 T. L. R. 327.

MAIN FRONT OF A BUILDING.

Page 564, add, as a note to sect. 10 (1). The question what is the main front of a building is one of fact for a magistrate to decide. (*L. C. C. v. Cannon Brewery Co.* (1910), 103 L. T. 574; 74 J. P. 461; 8 L. G. R. 1094.)

LIABILITIES OF OWNERS.

Page 582, after note (w). The owners are liable, although the new street was laid out without the sanction of the London County Council. (*Cumberwell B. C. v. Dixon*, [1910] 1 K. B. 424; 79 L. J. K. B. 318; 102 L. T. 33; 74 J. P. 77; 8 L. G. R. 238.)

COURT OF COMPETENT JURISDICTION.

Page 606, sect. 3. As to what is a court of competent jurisdiction within the meaning of this section, see *R. v. Garrett* (1907), 23 T. L. R. 308.

Page 618, after note (x). *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600; 76 L. J. Ch. 593; 71 J. P. 468; 97 L. T. 507; 23 T. L. R. 689.

Page 619, after note (d). The terms and conditions should be made before the sewers and drains are connected, otherwise the imposition of terms may be made difficult. (*East Barnet Valley U. C. v. Stallard*, [1909] 2 Ch. 555; 79 L. J. Ch. 103; 101 L. T. 642; 74 J. P. 9; 8 L. G. R. 192; 54 S. J. 30; 26 T. L. R. 22.)

Page 621, after note (o). See also *Suteliffe v. Sowerby Bdge. U. D. C.*, [1909] 73 J. P. 385; 100 L. T. 967; 7 L. G. R. 822.

Page 622, after note (f). A notice under this section is not a condition precedent to the right of the local authority to recover expenses of abating a nuisance.

(*Brentley B. Co. v. Chudler*, 1908, 1 K. B. 680; 77 L. J. K. B. 302; 98 L. T. 243; 72 J. P. 34; 6 L. G. R. 155.)

Page 624, after note (ii). The object of the 24 hour notice is explained in *Brentley Corporation v. Chudler*, 1908, 1 K. B. 680.

Page 625, after note (i) commencing p. 624). *Leam v. Newport Sanitary Authority* was not followed in *Pertonath Corp. v. Hall*, 1907, 71 J. P. 299; 24 T. L. R. 76.

Page 625, after note (q). *Robertson v. Bristol Corporation* was applied in *Wandsworth, B. Co. v. Gills*, 1910, 103 L. T. 568; 74 J. P. 364; 8 L. G. R. 1118.

As to requirements of notice generally, see *Stourbridge U. D. Co. v. Butler*, 1939, 1 Ch. 87; 78 L. L. Ch. 59; 99 L. T. 912; 73 J. P. 3; 7 L. G. R. 183; 25 T. L. R. 21.

Page 625, after note (n). The question whether the local authority is satisfied is one left for the justices to decide. (*Eller v. Bockley U. Co.*, 1908, 2 K. B. 671; 77 L. J. K. B. 864; 99 L. T. 299; 72 J. P. 325; 6 L. G. R. 876.)

Page 628, after case of *St. George's Local Board v. Hall and Jones*. See further *Tortoise Corporation v. Gibbs*, 1909, 73 J. P. 343.

Page 629, after note (p). No action will lie against a local authority for malicious refusal to approve plans. (*Davis v. Brentley Corporation*, 1908, 1 K. B. 170; 77 L. J. K. B. 51; 97 L. T. 795; 71 J. P. 513; 5 L. G. R. 1220; 24 T. L. R. 11.) See further as to *Wentwood, R. v. Chiswick Urban Council*, 1908, 6 L. G. R. 605; 72 J. P. 165.

Page 631, after note (h). Construction and maintenance of work may not be separate questions. (*Alving v. Smith*, 1907, 23 T. L. R. 447.)

Page 631, after note (f). As to reconstruction of an old building, see *Lee v. Barton*, 1909, 73 J. P. 599; 101 L. T. 600; 7 L. G. R. 1145. An old railway carriage turned into a dwelling-house is a new building within the meaning of this section. (*Hawthorn v. Troughen-Son U. D. Co.*, 1909, 2 K. B. 257; 78 L. J. K. B. 725; 101 L. T. 192; 73 J. P. 308; 7 L. G. R. 644; 25 T. L. R. 540; 26 S. J. 502.)

Page 640. *Dunnett v. Carrick* was affirmed by the Court of Appeal (Collins, M.B., Cresswell, Hardy and Farwell, L. JJ.) on December 11, 1906.

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